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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No. 532

SILVIO A. LANZA,

Appellant,

vs.

STATE OF NEW JERSEY, By JOSEPH E. McLEAN,
Commissioner of Conservation and Economic Development.

STATEMENT AS TO JURISDICTION

VITO F. LANZA,
Counsel and Attorney for Silvio A. Lanza,
Appellant.

INDEX

	PAGE
Opinion Below	1
The Grounds on Which the Jurisdiction of This Court is Involved	1
The Statute Involved	2
The Questions Presented by This Appeal	3
Statement of the Case	5
Subsequent Proceedings	8
The Federal Constitutional Questions Herein Presented Are Substantial	9
Conclusion	12
Appendix:	
Exhibit "A"—Copy of Opinion of Supreme Court of New Jersey dated June 27, 1958	13
Exhibit "B"—Oral Opinion and Decision of Hall, J.S.C.	29
Exhibit "C"—Statutes and Amendments Thereto Involved	49
Exhibit "D"—Judgment of Supreme Court dated 12/2/57 First Appealed From	60
Exhibit "E"—Mandate on Judgment of Affirmance of Supreme Court dated June 27, 1958	61
Exhibit "F"—Notice of Appeal Filed Sept. 22, 1958	62

Cases Cited

PAGE

Abbott v. Beth Israel Cemetery Ass'n of Woodbridge, 13 N. J. 528, 543 (1953) 8

Albright v. Sussex County Lake and Park Commission, 71 N.J.L. 303 (E. & A. 1904) 8

Cincinnati v. Louisville & N. R. Co., 223 U. S. 390, 32 St. Ct. 267, 56 L. Ed. 481 (1911) 8

City of Newark v. N. J. Turnpike Authority, 7 N. J. 377 (1951), app. dis. 342 U. S. 874 11

George v. Consolidated Lighting Co., 87 Vt. 411, 89 A. 635 (Sup. Ct. 1914) 7

Georgia v. Chattanooga, 264 U. S. 472, 44 S. Ct. 369, 68 L. Ed. 796 (1923) 7

Jamonneau v. Local Gov. Bd., 6 N. J. 281 (1951) ... 11

Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565 (1845) .. 7

Scott v. City of Toledo, 36 F. 385, 1 L.R.A. 688 (Cir. Ct. 1888) 7

State v. Lanza in 48 N. J. Super. 36; 137 Atl. 2nd 622, 27 N.J.O. 516; 143 A. 2d 571 1

United States v. Jones, 109 U. S. 513, 518, 3 S. Ct. 346, 27 L. Ed. 1015 (1883) 8

Western Union Tel. Co. v. Louisville & R. R. Co., 270 Ill. 399, 110 N. E. 583 (Sup. Ct. 1915) 7

Statutes Cited

PAGE

Round Valley Act (Chapter 60 of the Laws of 1956: N.J.S. 58:20-1 *et seq.*; as amended by L. 1957, ch. 215; L. 1958, ch. 57) 2, 3, 10

28 U.S.C.S. 1257, subd. 2 and subd. 3 2

Fourteenth Amendment to the Federal Constitution 3, 4, 5, 7, 10, 11

Miscellaneous

16A C.J.S. "Constitutional Law", s. 646 and cases cited at p. 921 11

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No.....

SILVIO A. LANZA,

Appellant,

vs.

STATE OF NEW JERSEY, by JOSEPH E. McLEAN, Commissioner of Conservation and Economic Development.

STATEMENT AS TO JURISDICTION

Silvio A. Lanza, the above named appellant, has appealed to this Court from a final judgment of the Supreme Court of New Jersey, dated June 27, 1958.

Opinion Below

The opinion of the Supreme Court of New Jersey is reported under the title *State* v. *Lanza* in 48 N. J. Super. 36; 137 Atl. 2nd 622, 27 N.J.O. 516; 143 A. 2d 571. Copy of the opinion is annexed hereto as Exhibit "A". A copy of the opinion of Judge Hall in the New Jersey Superior Court is annexed hereto as Exhibit "B".

The Grounds on Which the Jurisdiction of This Court is Invoked

The State of New Jersey, as part plaintiff, brought this action to condemn certain lands in Round Valley, New Jersey, belonging to appellant Silvio A. Lanza. The action was brought pursuant to a special condemnation statute, known as the Round Valley Act (Chapter 60 of the Laws of 1956; N.J.S. 58:20-1 *et seq.;* as amended by L. 1957, ch. 215; L. 1958, ch. 57). Exhibit "C", hereto annexed, consists of copies of the text of the original statute (L. 1956, ch. 60) and of the two subsequent amendments thereto (L. 1957, ch. 215; L. 1958, ch. 57).

The appellant put in an answer challenging the constitutionality of the special condemnation act. On December 2, 1957 there was entered in the New Jersey Superior Court, Law Division, a judgment upholding the statute, attached hereto as Exhibit D. Appellant appealed to the Appellate Division of the Superior Court but the Supreme Court of New Jersey took the case on its own motion and handed down its judgment of affirmance on June 27, 1958, attached hereto as Exhibit E. Appellant's notice of appeal to this Court is dated September 19, 1958 and was served and filed on September 22, 1958 and is attached hereto as Exhibit F.

Appellant believes that his appeal to this Court is properly taken under 28 U.S.C. S. 1257, subd. 2 and subd. 3.

The Statute Involved

The text of the special condemnation statute involved (L. 1956, ch. 60) together with the text of the two subsequent amendatory acts (L. 1957, ch. 215; L. 1958, ch. 57) is set out in Exhibit "C" hereto annexed.

The Questions Presented by This Appeal

1. Is C. 60 of the Laws of 1956 of the State of New Jersey (N.J.S.A. 58:20-1); approved June 1st, 1956, repugnant to the restrictions of the due process clauses of the 14th Amendment to the Federal Constitution?

2. Is C. 60 of the Laws of 1956 of the State of New Jersey (N.J.S.A. 58:20-1); approved June 1st, 1956, repugnant to the restrictions of the equal protection clause of the 14th Amendment to the Federal Constitution?

3. Did the Legislature in enacting the Round Valley Act (C. 60 of the Laws of 1956 of the State of New Jersey, N.J.S.A. 58:20-1; as amended by Chapter 215 of the Laws of 1957); create a "debt" or "liability" of the State of New Jersey in contravention of the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution?

4. Is C. 60 of the Laws of 1956 of the State of New Jersey (N.J.S.A. 58:20-1); approved June 1st 1956 repugnant to the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution, in that the same involves an unconstitutional delegation of legislative powers to the Commissioner of Conservation and Economic Development?

5. Is C. 60 of the Laws of 1956 of the State of New Jersey (N.J.S.A. 58:20-1); approved June 1st, 1956 repugnant to the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution; in that the same fails to provide Appellant and other interested parties due notice and an opportunity to be heard?

6. Is the judgment of the Supreme Court of the State of New Jersey filed June 27th, 1958, affirming the judgment of the Superior Court filed in Hunterdon County December 2nd, 1957 granting the relief prayed for by the Appellee, striking the answers and appointing Commissioners to fix compensation to be paid to the Appellant; in contravention of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution?

7. Is the Judgment of the Supreme Court of the State of New Jersey filed June 27th, 1958, affirming the judgment of the Superior Court filed in Hunterdon County December 2nd, 1957 granting the relief prayed for by the Appellee, striking the answers and appointing Commissioners to fix compensation to be paid to the Appellant; in contravention of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution, on the ground that the statutory authority, therefor, had expired?

8. Did the Courts below err in precluding the Appellant; in contravention of the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution; from demonstrating that the Commissioner of Conservation and Economic Development had delegated to others powers attempted to be conferred upon him by the Round Valley Act, supra.?

9. Did the Legislature of the State of New Jersey appropriate funds for the purposes set forth in the Round Valley Act supra. in violation of the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution, since it does not appear that the Governor of the State of New Jersey had certified that there were sufficient funds on hand or anticipated for this improvement.

10. Was the employment of Special Counsel to prosecute this action on behalf of the Appellee, repugnant to the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution?

11. Is the present Appellee the Official authorized by the Round Valley Act to conduct this action as party-plaintiff; in conformity with the restrictions of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution?

Statement of the Case

The complaint herein alleged as follows:

The Commissioner of Conservation and Economic Development is authorized by the Round Valley Act to acquire by purchase or condemnation such part of the Valley which in his judgment is appropriate and useful for the future establishment of a water supply system; he determined to acquire the appellant's property in the Valley; the appellant and he disagreed as to the price; wherefore judgment is demanded against appellant and also the appointment of three commissioners to assess damages for the taking.

Appellant's answer, *inter alia*, challenged the constitutional validity of the special act. Thus, appellant's *First Separate Defense* charged that the act made an unlawful delegation of legislative power to the Commissioner of Conservation and Economic Development. His Second Separate Defense alleged that the act was so vague and indefinite as to amount to an abdication of legislative power to the Commissioner. His Third Separate Defense alleges that the special act is unconstitutional in that it fails to provide appellant and other interested parties with an opportunity to be heard on the question whether the land in question is, in the words of the statute,

"appropriate and useful for the future establishment of a water supply system the source of which shall be solely the Delaware River, exclusive of its tributaries."

The Supreme Court, Law Division, held a summary hearing on the matter, at which hearing Judge Hall presided. At the hearing, appellant demonstrated that the Commissioner had arbitrarily acquired much more land than the State could use for a future water supply system based solely on the Delaware River because an existing decree of the United States Supreme Court limits the State of New Jersey to taking 100 million gallons of Delaware River water per day out of basin uses and existing commitments reduce the Delaware water available for any water system at Round Valley to an amount which would permit only a much smaller reservoir.

In this connection, the appellant attempted to develop, by cross-examination of the Commissioner, on what basis the Commissioner had determined to acquire all the Valley land in the face of a situation that would prevent much of that land from being used for the only purpose for which the Legislature had authorized its acquisition,—namely, for a water supply system based solely on the Delaware River. But the trial judge refused to permit such cross-examination of the Commissioner and, in its opinion, justified the Commissioner's action in this case upon the supposition that a way might be found to get around the decree of the United States Supreme Court, saying that:

> "The (United States Supreme) Court may at some time later date allow New Jersey to take more, or other means may be devised or adopted to acquire the use of more of the water for storage here."

However, the Legislature recognized the force of appellant's argument because, shortly after the trial and the handing down of the trial Court's opinion herein,

it amended the Round Valley Act so as to authorize a water supply system based on the south branch of the Raritan River, in addition to the Delaware River (L. 1957, Ch. 215, approved December 26, 1957). But the Legislature did nothing to unite into the act more specific standards to guide the Commissioner's administrative determinations. Thus, as an unlawful delegation of the legislative power to an administrative official, the act is as objectionable in its amended form as it was in its original form.

In its opinion of June 27, 1958, the New Jersey Supreme Court held that the provisions of the special act in question were not repugnant to the Fourteenth Amendment to the United States Constitution, stating, in part, as follows:

> "Eminent domain" is the power of the State to take private property for public use, for which "just compensation" must be made in virtue of the 1947 *State Constitution, Art.* 1, *par.* 20, and the Fourteenth Amendment to the Federal Constitution. It is a right founded in the law of necessity which is inherent in sovereignty and essential to the existence of all government, even in its most primitive forms, a right exercised by the Romans, whence came the term "eminent domain", in the construction of roads, aqueducts and similar public works. *Georgia* v. *Chattanooga,* 264 *U. S.* 472, 44 *S. Ct.* 369, 68 *L. Ed.* 796 (1923); *Pollard* v. *Hagan,* 3 *How.* 212, 11 *L. Ed.* 565 (1845); *Scott* v. *City of Toledo,* 36 *F.* 385, 1 *L.R.A.* 688 (*Cir. Ct.* 1888); *Western Union Tel. Co.* v. *Louisville & R. R. Co.,* 270 *Ill.* 399, 110 *N. E.* 583 (*Sup. Ct.* 1915); *George* v. *Consolidated Lighting Co.,* 87 *Vt.* 411, 89 *A.* 635 (*Sup. Ct.* 1914).
>
> The constitutional provision is not the source, but rather a limitation upon the exercise of this attribute of sovereignty; and it would seem to be basic to the

conception that "when the use of which the property taken is applied is public, the propriety or expediency of the appropriation cannot be called in question by any other authority." *United States* v. *Jones*, 109 *U. S.* 513, 518, 3 *S. Ct.* 346, 27 *L. Ed.* 1015 (1883); *Cincinnati* v. *Louisville & N. R. Co.*, 223 *U. S.* 390, 32 *S. Ct.* 267, 56 *L. Ed.* 481 (1911). And see *Abbott* v. *Beth Israel Cemetery Ass'n. of Woodbridge*, 13 *N. J.* 528, 543 (1953).

The exercise of the State's sovereign power is the exclusive province of the legislative branch of the government; and, since the Legislature cannot in all cases directly supervise the taking of property by eminent domain, it may delegate the exercise of the power. It is for the Legislature to determine what constitutes a public use, a finding beyond judicial interference unless it be unreasonable and arbitrary and a perversion of the power. Compare *Albright* v. *Sussex County Lake and Park Commission*, 71 *N.J.L.* 303 (*E. & A.* 1904).

Here, the public use was found by the Legislature and the delegation to the Commissioner of authority to acquire lands for the given purpose, either by purchase or by the exercise of the power of eminent domain, was expressed in terms certain and definite for the fulfillment of the declared imperative need.

Subsequent Proceedings

After the Supreme Court handed down its decision, appellant moved in that Court for recall of the mandate and for reargument but the application was denied. He was also unable to obtain a stay of proceedings pending review of the case by this Court.

Meantime, he had been forced on at a hearing before the Commissioners of appraisal, appointed by the trial

Court. The Commissioners made an award of a sum representing only a fraction of the value of the property. Appellant sought a review in the Superior Court of the determination of the Commissioners and has been forced on for a hearing in the Superior Court although the appeal to this Court is still pending. The State has paid into Court a deposit in the sum awarded by the Commissioners of appraisal but has not yet taken title to or possession of the property. The trial of the matter in the Superior Court is now proceeding.

The Federal Constitutional Questions Herein Presented Are Substantial

The best proof that the statute confers unbridled discretion upon the Commissioner to condemn land is to look at the result achieved in this case. Here, although the Legislature contemplated that the land acquired would be used for a water supply system based solely on the Delaware River, the Commissioner went ahead and acquired vastly more land than could legally be used for such purpose. Yet the trial Court took the view that his action in that respect was not open to attack and the judgment of the trial Court was sustained by the New Jersey Supreme Court. Nevertheless, after appellant raised the question, the Legislature itself recognized the validity of his argument by hastily amending the act so as to include the south branch of the Raritan River as an additional source of water supply. But nothing was done to write into the statute legislative standards to confine in any degree the uncontrolled discretion of the Commissioner. All that the amendment did was to ratify, *ex post facto*, the result achieved by him on his own initiative.

Appellant respectfully submits that a state statute authorizing an administrative official to condemn private property at his own discretion is repugnant to the due

process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.

The Legislature is asking the Commissioner of Economic Development to acquire certain lands for use in a future Water Supply system. What lands shall be acquire?

> "* * * such part of the area commonly known as Round Valley, located in Hunterdon County, which in the judgment of the commissioner is appropriate and useful for the future establishment of a water supply system the source of which shall be solely the Delaware River, exclusive of its tributaries." N.J.R.S. 58:20-1

In other words, the Commissioner must make the following determinations. He must decide what is Round Valley. (At the outset we are met by the fact that Round Valley has no definite boundary on at least one side.) He must decide what parts are appropriate and useful for the future establishment of a Water Supply System or Systems confined to the Delaware River. Next the Commissioner must decide what parts of this area would be "appropriate" or "useful" for a future "Water Supply System." But what is the future "Water Supply System"? Where will it be located? Who will be its users? Where will the pipes, mains, pumping stations and connections be located? What is to be its extent? If such system is to serve local communities only, a much smaller area of land will be "appropriated and useful" than if it is to serve a major portion, or the whole, of the state. This is not a situation where a highway is to be laid out after the legislature has established its general route and the agency of the state is given authority to determine its exact course and the property needed therefor. The Commissioner must determine the requirements of a Water System of unknown extent and location; he must then determine what lands in an area are "appropriate and useful" for such a system. He must do all this

although the Legislature has not made up its mind on these questions.

These are questions to be determined by the Legislature. There was at the time of the Commissioner's determination no existing or presently contemplated Water Supply System. It is common knowledge that the whereabouts of the "Water Supply System," its extent, and in fact almost everything about it have been hotly disputed through the years by the Legislature, and the Executive Branch of the Government and no definite decision has even yet been reached.

The Statute is completely devoid of necessary standards. See *Jamouneau* v. *Loc. Gov. Bd.*, 6 N. J. 281 (1951). The Court below relies on the *City of Newark* v. *N. J. Turnpike Authority*, 7 N. J. 377 (1951), app. dis. 342 U. S. 874. But in that case the Court found numerous standards as detailed as could reasonable be incorporated * * *" (p. 384).

The delegation of power here is delegation run amok. Sustaining the power of eminent domain here would sustain legislation sans standards directing an administrative official to condemn such parts of Hunterdon, Essex, and Hudson Counties as he might think "appropriate and useful" for future establishment of a Water Supply System, the nature, extent, etc., of the Water Supply System to be determined by later Legislatures.

It is well established that the taking of private property for a public use is in violation of the due process clause when the condemnation is made without proper authority therefor.

> 16A C.J.S. "Constitutional Law", s.646, and cases cited at p. 921.

Under that text the Round Valley Act is invalid under the Fourteenth Amendment.

CONCLUSION

The appeal as of right is properly taken. On appeal, the judgment of the New Jersey Supreme Court should be reversed.

Dated: November 17, 1958.

Respectfully submitted,

VITO F. LANZA,
Counsel and Attorney for
Silvio A. Lanza, Appellant

APPENDIX

Exhibit "A"

Copy of Opinion of Supreme Court of New Jersey dated June 27, 1958

SUPREME COURT OF NEW JERSEY

A-137 September Term, 1957

STATE OF NEW JERSEY, By JOSEPH E. McLEAN, Commissioner of Conservation and Economic Development,
Plaintiff-Respondent,

vs.

SILVIO A. LANZA, *et al.*,
Defendants-Appellants.

Argued May 20, 1958. Decided June 27, 1958.

On certified appeal to the Appellate Division from the Law Division of the Superior Court.

Mr. Burrell Ives Humphreys argued the cause for appellant Silvio A. Lanza.

Mr. Bernard Hellring, Special Counsel, argued the cause for the State (*Mr. Philip Lindeman, II*, on the brief; *Mr. David Furman*, Acting Attorney General, attorney).

The opinion of the court was delivered by HEHER, J.

We certified, sua sponte, the defendant landowner's appeal to the Appellate Division of the Superior Court from a judgment of the Law Division of the Court appoint-

ing commissioners under *R.S.* 20:1-1, *et seq.*, as amended by *L.* 1953, *c.* 20, to assess the damages to be sustained by the taking and condemning by the State of lands and property deemed "appropriate and useful for the future establishment of a water supply system," pursuant to *L.* 1956, *c.* 60, *N.J.S.A.* 58:20-1, *et seq.*

The enabling act, *L.* 1956, *C.* 60, *N.J.S.A.* 58:20-1, *et seq.*, authorizes and directs the Commissioner of Conservation and Economic Development, *section* 1, as amended by *L.* 1957, *c.* 215, effective December 26, 1957, "to acquire, in the name of the State, within 2 years from the effective date of (the) act, such part of the area commonly known as Round Valley, located in Hunterdon county, which in the judgment of the commissioner is appropriate and useful for the future establishment of a water supply system the source of which shall be either the Delaware river, exclusive of its tributaries, or the south branch of the Raritan river or both."

The acquisition of the real property to that end, *section* 2, may be made by purchase or by the exercise of the power of eminent domain according to *R.S.* 20:1-1, *et seq.* and real property thus acquired, *section* 4, as amended by *L.* 1957, *c.* 215, "shall be held primarily for use in connection with a water supply system the source of which shall be either the Delaware river, exclusive of its tributaries, or the south branch of the Raritan river or both, but shall also be made available, as a State reservation, for recreational and other State uses consistent with its primary use, in accordance with rules and regulations to be promulgated by the Commissioner of Conservation and Economic Development."

And "(t)o the end that municipalities may not suffer loss of taxes by reason of the acquisition and ownership by the State * * * of property therein," it is provided, *section* 5, as amended by *L.* 1957, *c.* 215, that the State Treasurer "upon certification of the Commissioner of Con-

servation and Economic Development shall pay annually on October 1 to each municipality in which property is acquired pursuant to (the) act (a) a sum equal to that last paid as taxes upon such land for the taxable year immediately prior to the time of its acquisition and (b) in addition, for a period of 13 years beginning with the year 1958 the following amounts: in the first year a sum of money equal to that last paid as taxes upon improvements upon such land for the taxable year immediately prior to the time of its acquisition; and thereafter the following percentages of the amount paid in the first year, to wit, second year 92%; third year 84%; fourth year 76%; fifth year 68%; sixth year 60%; seventh year 52%; eighth year 44%; ninth year 36%; tenth year 28%; eleventh year 20%; twelfth year 12%; thirteenth year 4%."

It is then provided that "All sums of money received by the respective municipalities as compensation for loss of tax revenue pursuant to this section shall be applied to the same purposes as is the tax revenue from the assessment and collection of taxes on real property of the said municipalities, and to accomplish this end such sums shall be apportioned in the same manner as the general tax rate of the municipality for the tax year preceding the year of receipt"; that "The State shall be reimbursed for payments required to be made by this section out of the proceeds received for the sale of water supplied by said system"; and that the State Treasurer "shall also pay to any county or municipality the cost of relocating any municipal or county roads made necessary by reason of the acquisition or use of property pursuant to (the) act."

And *section* 7 "appropriated" to the Department of Conservation and Economic Development "for the purposes of this act, $3,000,000, or so much thereof as may be needed, from the Veterans Loan Guaranty and Insurance Fund" established pursuant to *L.* 1944, *c.* 126, as amended, "which is in excess of the total amounts of guaranteed or

insured loans outstanding now or hereafter as obligations of the Veterans Loan Authority created pursuant" to that chapter.

The complaint alleges that "Plaintiff has determined to acquire" lands of the defendant, therein described by metes and bounds, in fee simple absolute, together with all easements, prescriptive rights and rights of way, "for public use in accordance with the * * * statutory authority vested in him, the said lands and premises being, in the judgment of the Commissioner of Conservation and Economic Development, appropriate and useful for the said statutory purpose," but not purchaseable by agreement with the owner because of disagreement as to the price.

The answer admits defendant's "unwillingness to sell the lands," denies plaintiff's "right to acquire the same" as not founded on a constitutionally-sufficient statute, and asserts an irregular exercise of the statutory power on the contrary hypothesis.

The defenses were overruled and the commissioners were appointed after a summary hearing at which evidence was adduced; and the Appellate Division restrained the taking of possession until the determination of the appeal now before us.

The commissioners have made their report; and defendant's appeal from the award is now pending in the Superior Court.

I

The primary point made is that the Round Valley Act of 1956, *N.J.S.A.* 58:20-1, *et seq.*, "creates a debt or liability of the State to certain municipalities and counties without submitting the question to the voters as required" by *Art.* VIII, *Sec.* II, *par.* 3 of the 1947 *State Constitution.*

It is said in argument that the constitutional interdict is against "the creation of any debt or liability 'in any

manner' if it together with previous debts or liabilities exceeds 1% of the total appropriation for any given year unless the same be authorized by the voters"; and that the statute "obligated the State to pay certain municipalities an amount equal to the taxes lost as a result of the condemnation and to pay to counties and municipalities the cost of relocating any municipal or county roads." *McCutcheon* v. *State Building Authority*, 13 *N. J.* 46 (1953), and *Behnke* v. *New Jersey Highway Authority*, 13 *N. J.* 14, 28 (1953), are deemed conclusive of the issue.

But the Legislature has not thereby, in any manner, created "a debt or debts, liability or liabilities of the State" for the purchase price of the real property found essential to the consummation of the project, nor did it intend so to do; it has merely made provision for the replacement of the local tax losses, and the payment of the cost of relocating municipal or county roads made necessary by "the acquisition or use of property" pursuant to the act, all attending the fulfillment of an undertaking in the interest of the general health and welfare, the "payments required" by that "section" to be eventually reimbursed from the proceeds of the sale of water thereby to be supplied, and thus an inherently voluntary subsidiary measure to avert economic crisis in the functioning of its own local subdivisions of government as a direct result of its own action for the common good of its inhabitants in a critical area of State responsibility, the basic object of the legislation. It was a secondary or minor means of warding off undue hardship and failure in local administration of government by its own agencies that would otherwise be an incident of a course taken to meet a great necessity of the people as a whole. The losses thus reimbursed have no direct relation to the compensation to be made for the real property to be acquired for the service of the current general and reasonably foreseeable needs. $3,000,000 was appropriated by the act for that purpose. And, more-

over, the recompense thus provided for the loss of tax revenue shall be applied "to the same purposes as is the tax revenue" from the assessment and collection of taxes on real property of the particular municipality, and "apportioned in the same manner as the general tax rate" of the municipality "for the tax year preceding the year of receipt," a course of action in which the State is directly interested. And the direction to the State Treasurer to pay the cost of road relocations to the county or municipality, presumably from available moneys in the Treasury, involves voluntary payments of the same character to the same end. In this context, for the purposes of the instant case, there is no essential or qualitative difference between the reimbursement of tax revenue losses and the payment of the cost of relocating local roads.

Neither of these provisions gives rise to a "debt" or "liability" within the intendment of the constitutional limitation as interpreted and applied in *McCutcheon* and *Behnke*. There is no bargain or professed contractual, conventional or legal undertaking to recompense the given loss of tax revenue, but rather a truly "voluntary appropriation" for a "lawful object" according to the distinction made in *Wilson, Attorney General* v. *State Water Supply Commission*, 84 *N. J. Eq.* 150 (*E.&A.* 1915), and *City of Passaic* v. *Consolidated Police and Firemen's Pension Fund Commission*, 18 *N. J.* 137 (1955). In *Wilson*, Mr. Justice Carrison said of the then constitutional limitations 1844 *Constitution, Art.* VIII, *sec.* II, *par.* 3, in terms much the same as its 1947 counterpart, that the interdiction is against the "construction of such debts" and not against "voluntary appropriations for any lawful object." In *Passaic*, Chief Justice Vanderbilt, speaking for a unanimous court, had this to say of a like argument directed to the provision of the act "requiring the State to contribute" to the consolidated police and firemen's pension, under the control of a State Commission, *L.* 1952, *c.* 358, *N.J.S.A.*

Exhibit "A"

43:16-5: "No debt has been created here, but rather than present legislation merely provides that the State shall annually contribute to the fund." And the same is equally true of the measure for relief from the economic burden of road relocation.

Of course, the constitutional debt-limitation provision is not limited in quality and scope to debts or liabilities enforceable by action, a contradiction in terms, so applied. Here, the Legislature merely undertook to supply the tax revenue loss out of the sale of the water product of the realized facility, meanwhile by essentially voluntary annual appropriations to continue local governmental function and operation through its own subordinate political divisions, just as much so as in the case of other subventions by the State to its agencies for local government and municipal administration. In *McCutcheon* and *Behnke*, the "debts" and "liabilities" would consist of bonds to be sold and the "use" and "loaning" of the State's credit for the creation of the required capital fund, radically different transactions involving "moral and ethical compulsions."

Here, the municipalities have no property interest in the lands; and they have no special concern in the realization of this program for the general and common use of the State's inhabitants, nor are they parties to the proceeding to that end. They are political subdivisions or departments of the State for local self-government; and their relations are to be treated accordingly. *City of Jersey City* v. *Martin*, 126 *N.J.L.* 353 (*E.&A.* 1941).

Such are the differentiating elements in assessing the basic quality of the constitutional limitation.

And the immunity of the property of the State and of its political subdivisions from taxation does not come from the want to legislative power to subject such property to taxation. "The State may, if it sees fit, subject its property, and the property owned by its municipal divisions, to

taxation, in common with other property within its territory." *Trustees of Public Schools* v. *City of Trenton*, 30 *N. J. Eq.* 667, 681 (*E.&A.* 1879). See *R.S.* 54:4-3,3, as amended by *L.* 1950, *c.* 269; also *Jamouneau* v. *Division of Tax Appeals*, 2 *N. J.* 325 (1949).

The *Constitution* derives its force, not from the Convention which framed it, but from the people who ratified it; and the intent to be arrived at is that of the people. Hence, we inquire as to the meaning the symbols of expression would most naturally and plainly convey, the sense most obvious to the common understanding, that is to say, the reason and spirit which giveth life to the law, and not the letter which killeth. And implication is a vital element of the interpretive process. That which may reasonably be implied is as much a part of the instrument as that which is stated in terms—an intention apparent in the writing and therefore an integral part of the expression itself. *Gangemi* v. *Berry*, 25 *N. J.* 1 (1957).

Moreover, were it infected with the vice thus attributed to it, this statutory provision would be severable and the statute would stand otherwise. There is no severability clause here; but that is not *ipso facto* conclusive. The principle of separability is in aid of the intention of the lawgiver. The essential inquiry is whether the lawmaking body designed that the enactment should stand or fall as a unitary whole. It is not enough that the act be severable in fact; its severability in the event of partial invalidity must also have been within the legislative intention. It is a question of interpretation and of legislative intent whether the particular provision is so interwoven with the invalid clauses as that it cannot stand alone. A severability clause "provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command." *Dorchy* v. *Kansas*, 264 *U. S.* 286, 44 *S. Ct.* 323, 68 *L. Ed.* 686 (1924). Even where a severability clause has reversed the presumption

of an intent that unless the act operate as an entirety it shall be wholly ineffective the void provision may "so affect the dominant aim of the whole statute as to carry it down with them." *Railroad Retirement Board* v. *Alton R. Co.*, 295 *U. S.* 330, 55 *S. Ct.* 758, 768, 79 *L. Ed.* 1468 (1934). And compare *Riccio* v. *Hoboken*, 69 *N.J.L.* 649 (*E.&A.* 1903); *United States* v. *Reese*, 92 *U. S.* 214, 23 *L. Ed.* 563 (1875); *United States* v. *Steffens*, 100 *U. S.* 82, 25 *L. Ed.* 550 (1879—Trade-Mark cases).

And, by the same reasoning, even if there be no such express declaration of separability, an unconstitutional provision in a statute does not affect the validity of a separate article or clause of the enactment, if otherwise valid, unless the two are so intimately connected and mutually dependent as reasonably to sustain the hypothesis that the Legislature would not have adopted the one without the other. Where the principal object of the statute is constitutional, and the objectionable provision can be excised without substantial impairment of the general purpose, the statute is operative except insofar as it may contravene fundamental law. And the question is to be considered in the light of the settled principle that a permissible doubt as to validity is to be resolved in favor of the enactment. *St. John The Baptist Greek Catholic Church* v. *Genger*, 121 *N. J. Eq.* 349 (*E.&A.* 1937). See *State* v. *Doto*, 10 *N. J.* 318 (1952); *Angermeier* v. *Borough of Sea Girt*, 27 *N. J.* (1958).

So assessed, the challenged provisions for the relief of the municipalities from the consequence of the tax revenue loss and road relocation would be separable, were they for any reason ineffective; and the statute would not thereby be otherwise impaired.

II

But it is urged that the Legislature, by this Course, "unconstitutionally delegated its legislative powers to an

administrative official," in that the Round Valley Act "does not establish nor purport to establish a Water Supply System for the State," and it is left to the Commissioner to "make the following determinations": (a) "decide what is Round Valley," which "has no definite boundary on at least one side"; (b) "decide what parts are appropriate and useful for the *future* establishment of a Water Supply System or Systems confined to the Delaware River"; (c) "decide what parts of this area would be 'appropriate' or useful' for a future 'Water Supply System' "—"what is the future 'Water Supply System,' " its "location," "who will be its users," the location of the "pipes, mains, pumping stations and connections"; and what "its extent" is to be, the particular point being that if "such system is to serve local communities only, a much smaller area of land will be 'appropriate and useful' than if it is to serve a major portion, or the whole, of the state."

In sum, the argument is that the Commissioner "must determine the requirements of a Water System of unknown extent and location; he must then determine what lands in an area are 'appropriate and useful' for such a system"; and he "must do all this although the Legislature has not made up its mind on these questions."

All these, it is said, are "questions to be determined by the Legislature"; there was at the time of the Commissioner's determination "no existing or presently contemplated Water Supply System"; the statute "is completely devoid of necessary standards"; and the "delegation of power here is delegation to run amok."

"Eminent domain" is the power of the State to take private property for public use, for which "just compensation" must be made in virtue of the 1947 *State Constitution, Art.* I, *par.* 20, and the Fourteenth Amendment to the Federal Constitution. It is a right founded in the law of necessity which is inherent in sovereignty

and essential to the existence of all government, even in its most primitive forms, a right exercised by the Romans, whence came the term "eminent domain", in the construction of roads, aqueducts and similar public works. *Georgia* v. *Chattanooga*, 264 *U. S.* 472, 44 *S. Ct.* 369, 68 *L. Ed.* 796 (1923); *Pollard* v. *Hagan*, 3 *How.* 212, 11 *L. Ed.* 565 (1845); *Scott* v. *City of Toledo*, 36 *F.* 385 1 *L.R.A.* 688 (*Cir. Ct.* 1888); *Western Union Tel. Co.* v *Louisville & Jt. R. Co.*, 270 *Ill.* 399, 110 *N. E.* 583 (*Sup. Ct.* 1915); *George* v. *Consolidated Lighting Co.*, 87 *Vt.* 411, 89 *A.* 635 (*Sup. Ct.* 1914).

The constitutional provision is not the source, but rather a limitation upon the exercise of this attribute of sovereignty; and it would seem to be basic to this conception that "when the use to which the property taken is applied is public, the property or expediency of the appropriation cannot be called in question by any other authority." *United States* v. *Jones*, 109 *U. S.* 513, 518, 3 *S. Ct.* 346, 27 *L. Ed.* 1015 (1883); *Cincinnati* v. *Louisville & N. R. Co.*, 223 *U. S.* 390, 32 *S. Ct.* 267, 56 *L. Ed.* 481 (1911). And see *Abbott* v. *Beth Israel Cemetery Ass'n of Woodbridge*, 13 *N. J.* 528, 543 (1953).

The exercise of the State's sovereign power is the exclusive province of the legislative branch of the government; and, since the Legislature cannot in all cases directly supervise the taking of property by eminent domain, it may delegate the exercise of the power. It is for the Legislature to determine what constitutes a public use, a finding beyond judicial interference unless it be unreasonable and arbitrary and a perversion of the power. Compare *Albright* v. *Sussex County Lake and Park Commission*, 71 *N.J.L.* 303 (*E.&A.* 1904).

Here, the public use was found by the Legislature and the delegation to the Commissioner of authority to acquire lands for the given purpose, either by purchase or by the exercise of the power of eminent domain, was

expressed in terms certain and definite for the fulfillment of the declared imperative need.

The preamble recites the "long recognized" need for "additional supplies of water" to meet "the future requirements of the people of the State"; the making of "various proposals * * * for the creation of new water supply systems" to serve the need, "in particular, the projects for the establishment of a water supply system to be known as the Round Valley Water Supply System, for the use of the Delaware river waters"; and the legislative finding that it "is advisable to authorize the acquisition of certain real property which will be needed for additional water supply systems, without awaiting the enactment into law of such statutes as may be necessary to specifically create and establish new and additional water supply systems." And to effectuate this legislative plan as a means of meeting a great public necessity, the Commissioner was authorized and directed to acquire, within two years, "such part of the area (in Hunterdon County) commonly known as Round Valley" as, in his judgment, "is appropriate and useful" for the establishment of a water system having the given source, to be available also for "recreational and other State uses" consistent with the primary use.

The Round Valley area had been chosen for the purpose by the Legislature itself, after long public discussion and debate and consultation with engineering specialists; its geographical identity is commonly known; and the Commissioner was delegated to acquire the land, such as would be "appropriate and useful" for the defined primary and secondary projects. There was no undue delegation of legislative power in this proceeding; the Commissioner's authority is administrative, that is to say, the execution of the declared legislative will according to a definite and certain policy and rule of action. Compare *City of Newark* v. *New Jersey Turnpike Authority*, 7 *N. J.* 377 (1951); *Burnett* v. *Abbott*, 14 *N. J.* 291 (1954); *New Jersey Turn-*

pike Authority v. *Washington Township*, 16 *N. J.* 38 (1954); *City of Trenton* v. *Lenzner*, 16 *N. J.* 465 (1954); *State Board of Milk Control* v. *Newark Milk Co.*, 118 *N. J. Eq.* 504 (*E.&A.* 1935); *Olmstead* v. *Proprietors of the Morris Aqueduct*, 47 *N.J.L.* 311 (*E.&A.* 1885); *Tennessee Gas Transmission Co.* v. *Hirschfield*, 38 *N.J. Super.* 132 (*App. Div.* 1955). And see *United States* v. *Carmack*, 389 *U. S.* 230, 67 *S. Ct.* 252, 91 *L. Ed.* 209 (1946); *Joslin Mfg. Co.* v. *Providence*, 262 *U. S.* 668, 43 *S. Ct.* 684; 67 *L. Ed.* 1167 (1922).

III

But it is insisted that the landowner was precluded "from cross-examining the Commissioner with respect to his determination that the lands condemned were appropriate and useful for the purposes set forth in the Round Valley Act."

Conceding that "to prove the taking wrongful" in this regard, he must demonstrate "improper motives, bad faith or some other consideration amounting to a manifest abuse of the power of eminent domain," citing *Tennessee Gas Transmission Co.* v. *Hirschfield*, *supra*, and that he does not charge the Commissioner "with improper motives, or manifest abuse of discretion with regard to his taking" of the lands in question "*as a matter of location*," the landowner nevertheless urges that he should have been afforded an opportunity to prove that Round Valley is not "appropriate and useful" for the pursposes of the act "for, among other reasons, the lack of Delaware River water," and that the Commissioner "therefore did not make such a determination, or if he did, he manifestly abused his discretion."

The suitability of the Round Valley area for the proposed water supply system was established by the judgment of the Legislature itself; and the Commissioner was

directed to acquire "such part of the area" as in his judgment "is appropriate and useful" for a water supply system having its source in the Delaware River exclusive of its tributaries, later expanded by *L.* 1957, *c.* 215, to include the Raritan River as a source of supply.

The point is not made that the water supply from these sources is so lacking in volume as to render the lands inappropriate and useless for the fulfillment of the legislative object and policy. Indeed, it is said that, in view of the supplemental source provided by the act of 1957, the Commissioner "should now render a new determination and the defendant should have an opportunity to cross-examine the Commissioner on the appropriateness and usefulness of this new determination."

Commissioner McLean was cross-examined at length; and at the conclusion of the examination, counsel for the landowner announced that he would not call "any witnesses"; that his "sole purpose was to obtain the evidence upon which the Commissioner made his judgment," and "He says we have it here; that's all I need." The Commissioner and his administrative assistants and specialists produced technical data, maps, reports and surveys which had entered into his determination; and they were made available to defendant's counsel for use on cross-examination.

The question overruled, addressed to the Commissioner, was whether the "Tams Report" "mention(s) the fact" that New Jersey "can at present only divert 100 million gallons of Delaware water from the Delaware River for use outside the Delaware Watershed." Judge Hall deemed it to be irrelevant to the judicial inquiry "whether this is a good place for a reservoir," and "whether they can get enough water to fill it from the Delaware."

We hold that the Commissioner's determination constitutes a fair and just assessment of the facts related

to the legislative judgment he was directed to fulfill, in no sense unreasonable, capricious, or arbitrary; and that the refusal to receive the content of the Tams Report in the particular indicated was not prejudicial to the landowner. And this, without regard to the later expansion of the water source. The point made is basically in derogation of the legislative judgment; the Commissioner has not exceeded the need found by the Legislature.

IV

A. And it is contended that the action here "was maintained contrary to the provisions of the Round Valley Act," in the employment of "special counsel" to "prosecute (the) action."

The reasoning is that the Round Valley Act provides, *section* 3, *N.J.S.A.* 58:20-3, that in the event of condemnation proceedings, "the Attorney-General shall represent the State and the Commissioner" and, *section* 6, no part of the funds thereby appropriated shall be used for any purpose other than for payment of the cost of acquisition of real property by purchase or condemnation, and the cost of title examination and expert appraisals and testimony; that *L.* 1944, *c.* 20, *N.J.S.A.* 52:17A-13 forbids the employment of "special counsel" save as therein provided; and that the Legislature did not intend that "an action be brought contrary to their direction as to the use of public funds."

But the action was instituted and is maintained by the Attorney General, acting by special counsel appointed by him with the approval of the Governor. And the validity of the special counsel's employment and his right to compensation are collateral issues not relevant to this inquiry. Compare *State* v. *Bolitho*, 103 *N.J.L.* 246 (*Sup. Ct.* 1927), affirmed 104 *N.J.L.* 446 (*E.&A.* 1927). And

see *Driscoll* v. *Burlington-Bristol Bridge Co.*, 8 *N. J.* 433 (1952).

B. Finally, it is said that the Legislature "appropriated funds for the purposes set forth in the Round Valley Act in violation" of the 1947 *Constitution, Art.* VIII, *sec.* II, *par.* 2, "since the Governor did not certify as required by the Constitution" that there were "sufficient funds on hand and anticipated for this appropriation."

There was no proof below that the Governor had not certified that sufficient funds were on hand to sustain the appropriation made here; the appropriation was made, not from funds in the State Treasury, but from excess funds in the Veterans Loan Guaranty Fund, *L.* 1944, *c.* 126, as amended by *L.* 1946, *c.* 121, *N.J.S.A.* 38:23B-5; the landowner raised the point but did not undertake to prove it; the Attorney General calls attention to the Governor's Budget Message of January 31, 1955, for the fiscal year ending June 30, 19[illegible], showing that there would be an estimated balance in the Veterans Fund on June 30, 1956, over and above all estimated expenses and reserves, of approximately $9,000,000. The landowner can take nothing by this point.

Affirmed.

Exhibit "B"

Oral Opinion and Decision of Hall, J.S.C.

Before:

HONORABLE FREDERICK W. HALL, J.S.C.

At: Somerset County Court House
Somerville, New Jersey

November 1, 1957

Appearances:

Bernard Hellring, Esq., and Philip Lindeman, II, Esq., for Grover C. Richman, Jr., Esq., Attorney General of New Jersey, attorneys for the Plaintiff.

George F. R. Pollard, Esq., for Charles C. Trelease, Esq., attorneys for the Defendants.

* * *

(2) The Court: State of New Jersey by Joseph E. McLean, Commissioner of Conservation and Economic Development, versus Silvio A. Lanza and another. I am now ready to decide the case.

By this action under R.R. 4:85, the State of New Jersey, through the Commissioner of Conservation and Economic Development, seeks to condemn lands of the defendants, described in the complaint, which are located in Round Valley, Hunterdon County. The plaintiff's exercise of eminent domain is based on the Laws of 1956, Chapter 60 (N.J.S.A. 58:20-1 et seq.), approved June 1, 1956, which is commonly known as the Round Valley Act.

Defendants, by their answer, deny the State's right to condemn, principally on the grounds that the cited statute is unconstitutional and the Commissioner's exercise of power granted him thereby has been unlawfully exercised.

Exhibit "B"

Chapter 60 of the Laws of 1956 begins with the following preamble:

"Whereas, it has long been recognized (3) that additional supplies of water will be needed to meet the future requirements of the people of the State; and

"Whereas, to meet this need various proposals have been made for the creation of new water supply systems and, in particular, the projects for the establishment of a water supply system to be known as the Round Valley Supply System, for the use of the Delaware River waters; and

"Whereas, it is advisable to authorize the acquisition of certain real property which will be needed for additional water supply systems, without awaiting the enactment into law of such statutes as may be necessary to specifically create and establish new and additional water systems; now, therefore * * *."

Then follows these presently pertinent sections:

"Section 1. The Commissioner of Conservation and Economic Development is authorized and directed to acquire, in the name of the State, within 2 years (4) from the effective date of this act, such part of the area commonly known as Round Valley, located in Hunterdon County, which in the judgment of the commissioner is appropriate and useful for the future establishment of a water supply system the source of which shall be solely the Delaware River, exclusive of its tributaries.

"Section 2. Acquisition of said real property authorized and directed by this act may be made by purchase or by the exercise of the power of eminent domain, pursuant to the provisions of Chapter 1 of Title 20 of the Revised Statutes.

Exhibit "B"

"Section 3. In the event of condemnation proceedings pursuant to this act, the Attorney General shall represent the State and the Commissioner of Conservation and Economic Development.

"Section 4. Real property acquired pursuant to this act shall be held primarily for use in connection with a water supply system the source of which shall be solely the Delaware River, exclusive of its (5) tributaries, but shall also be made available, as a State reservation, for recreational and other state uses consistent with its primary use, in accordance with rules and regulations to be promulgated by the Commissioner of Conservation and Economic Development.

"Section 6. No part of funds appropriated by this act shall be used for any purpose other than for payment of the cost of acquisition of real property by purchase or condemnation award, expenses incurred for the examination of title to the property to be acquired and for expert appraisals and testimony with regard as to the value of property to be acquired.

"Section 7. There is hereby appropriated to the Department of Conservation and Economic Development for the purposes of this act, $3,000,000, or so much thereof as may be needed, from the Veterans Loan Guaranty and Insurance Fund established pursuant to Chapter 126 of the laws of 1944, as heretofore amended, which is in excess of the total amounts (6) of guaranteed or insured loans outstanding now or hereafter as obligation of the Veterans Loan Authority created pursuant to said chapter."

The basic constitutional objection which is raised derives from the particular language of Section 1 which directs the Commissioner to acquire "such part of the

area commonly known as Round Valley, located in Hunterdon County, which in the judgment of the commissioner is appropriate and useful for the future establishment of a water supply system the source of which shall be solely the Delaware River, exclusive of its tributaries." It is claimed that:

First, basing the appropriateness and usefulness for the precise statutory purpose of the lands decided to be taken on the "judgment of the Commissioner" rather than on a determination of these criteria grounded on factual findings is an improper delegation of legislative power to an administrative official.

Second, there is a complete absence of necessary definitions, designations and (7) standards as to "the area commonly known as Round Valley" (the area being said to be without known geographical limits), as to the part "of the area" to be affected, as to what constitutes "a water supply system" and as to how to determine what is "appropriate and useful for the future establishment" thereof, having in mind the limited source of supply prescribed. Vagueness is alleged to render the grant of authority nugatory. The further point is that the Commissioner cannot properly exercise his judgment as to what lands are appropriate and useful without first knowing what kind of a water supply system using only Delaware River water there is to be, and the legislature has given him no guidance and so his exercise of judgment cannot have been and was not properly and lawfully grounded or exercised.

Third, affected property owners, including defendants, are deprived of due process of law in that the statute makes no provision for a hearing and opportunity to be heard with respect to the Commissioner's basic determinations or with special regard (8) to the determination as to the taking of a particular owner's lands.

Exhibit "B"

It is to be noted that defendants' attack is very broad. They do not contend that their property is not within Round Valley or that the Commissioner abused his discretion on that score in determining to acquire it. In fact, their lands are clearly in the very center of the valley. The defendants' attack has been answered by plaintiff on the same broad basis and all questions will be so considered by the Court.

A further objection is raised on the theory that the appropriation made by Section 7 violates Article 8, Section 2, Paragraph 2, of the New Jersey Constitution in that there was no certification by the Governor that the appropriation contained therein, together with all prior appropriations made for the fiscal year, did not exceed the total amount of revenue on hand and anticipated which would be available to meet all appropriations during the fiscal period.

Finally, defendants contend that the action must be dismissed because it is (9) prosecuted by special counsel rather than by the Attorney-General contrary to Section 2 of the Act, which as I have said states that the Attorney-General shall represent the State and the Commissioner in condemnation proceedings, and in any event it is said there is no appropriation for such special counsel as required by N.J.S. 52:17A-13.

Despite the summary nature of the proceeding, the parties were given full opportunity to present all pertinent evidence at a regularly conducted trial of the issues raised. The plaintiff proved the allegations of the complaint—i.e., that the Commissioner had determined to acquire defendants' lands, which were within the area and in his judgment appropriate and useful for the statutory purpose, and that he had been unable to do so by reason of disagreement as to price. The State also voluntarily produced the Commissioner's staff for the project and his outside consulting engineers as witnesses if defendants desired to call them as such.

Exhibit "B"

Defendants were permitted, by cross-examination of the Commissioner, to (10) develop how he arrived at his determination of the lands to be taken insofar as it was material and relevant under the applicable law. Maps and reports used were produced and later offered in evidence by defendants. In fact, some of the evidence received on behalf of the defendants probably went beyond that which was strictly admissible under the legal principles hereafter referred to. No application was made to turn the action into a more plenary suit than it was, but I conceive that substantially no further admissible evidence would have thereby been discovered even if defendants had made such an application and it had been granted, since the obligation, raised principally involved and are limited by legal principles.

In approaching consideration of the questions involved, it must be kept foremost in mind that in an attack upon the constitutionality of a statute, the burden of proof is upon the attacking party. He must leave no reasonable doubt that the act is repugnant. There is a presumption of constitutional sufficiency. Jamouneau (11) versus Harner, 16 New Jersey Reports 500, at 515 (1954), certiorari denied 349 U. S. 904 (1955).

The fundamental concept of the power of eminent domain must also not be overlooked. It "is an inseparable attribute to sovereignty grounded in the primary duty of government to serve the common need and advance the general welfare." Ryan versus Housing Authority of Newark, 125 N.J.L. 336, 340 (Supreme Court 1940). It has been allotted to the legislative branch of government since the Magna Carta. Constitutions do not give but merely place limitations upon the power, which would otherwise be without limitation, as for example, Article 1, Section 20 of our Constitution of 1947 providing that private property shall not be taken for public use without just compensation. Abbott versus Beth Israel Cemetery

Association of Woodbridge, 13 New Jersey Reports 528 at 543 (1953).

In New Jersey the power resides in the State government. It is elementary that the power may be delegated by the (12) legislature as it has been in numerous instances by our legislature, to State agencies, municipal and other public corporations and private corporations engaged in a public business such as public utilities.

This the legislature does by the passage of legislation. The scope of the power delegated and the manner of its exercise are controlled by such legislation. Abbot versus Beth Israel Cemetery Association of Woodbridge, 13 New Jersey Reports at page 545.

Equally fundamental is the principle that the power may only be exercised or its exercise delegated for a use "public" in nature. Whether the use is such a judicial question. Ryan versus Housing Authority of Newark, supra. No question is raised here that the delegated exercise of the power is not for such a public use—i.e., the acquisition of real property for additional water supply systems to meet the future requirements of the people of the State, nor could it be, for it has long been held (13) that the State has an obligation to control and conserve its water resources for the benefit of all inhabitants. City of Bayonne versus New Jersey District Water Supply Commission, 30 New Jersey Super. 409 (Appellate Division 1954). It was also long ago said that the supplying of water to people is as public an enterprise as can be conceived. Olmsted versus Proprietors of the Morris Aqueduct, 47 N.J.L. 311, 332 (Court of Errors and Appeals 1885).

It is also affirmatively established that where the intended use is public the particular taking must be a "necessary" one for the use and the necessity and expediency of exercise of the power may be determined by such agency and in such mode as the State may

designate. Such is a legislative and not a judicial question. The quantity of land to be taken, its location and the time of taking are also legislative questions.

The exercise of all these elements is not subject to judicial interference when such exercise is in good faith and unless there is a plain case of abuse of discretion (14) in excess of the public use on which it is bottomed in the particular instance. Ryan versus Housing Authority of Newark, supra; City of Newark versus New Jersey Turnpike Authority, 7 New Jersey 377, at 385 (1951); Burnett versus Abbott, 14 New Jersey 291 (1954).

In dealing more specifically with defendants' objections, it must again be recalled that this is a statute where the delegation is for acquisition of land by the State and for a State purpose, and that the attack is not directed to any claim of abuse of discretion or exercise of power with respect to defendants' particular property, but rather to the delegation as a whole as found in the statute.

The first objection goes to the delegation of the "necessity." Here the concept is couched in the language of "appropriateness and usefulness" but in law in these circumstances the meaning is the same, the objection being to the delegation of the necessity being based on the "judgment" of the Commissioner.

(15) The instances of prior statutory delegation of the power to agencies and instrumentalities are innumerable. The pertinent language used is varied in almost every case. But no matter how expressed in a particular statute, it always comes down to resting on the standard of determination, judgment or opinion, as to necessity of the party to whom the power is delegated. As has been indicated this is primarily a legislative and not a judicial question. The language used in the instant statute I find not to be legally different than that found in the Turnpike Authority Act giving the authority power to acquire by eminent

domain "any land and other property which it may determine is reasonably necessary for any turnpike project * * *." N.J.S. 27:23-5 (j). Such a delegation was held to be unobjectionable in City of Newark versus New Jersey Turnpike Authority, supra, 7 New Jersey at pages 384 and 385. I therefore conclude that the terms and standards of delegation to the Commissioner in Section 1 of the instant statute are valid and constitutional. The (16) situation is not legally comparable or controlled by the precedents relating to requisite statutory standards for administrative action in quasi-judicial proceedings under the police power.

I proceed next to defendants' third objection—i.e. that there has been a violation of due process with respect to all affected property owners in that there is no requirement of a hearing, and in fact no hearing in the legal sense was held by the Commissioner, with respect to his basic determination of what properties to acquire. It is well settled that under eminent domain statutes, owners of land to be appropriated are not entitled, as an essential of due process in the sense of the Fourteenth Amendment, to a judicial or quasi-judicial hearing on the utility of the proposed improvement, the extent of public necessity for its construction, the expediency of constructing it and the necessity of the particular taking. Ryan versus Housing Authority of Newark, supra; Burnett versus Abbott, supra.

Perhaps it might be noted that in (17) one situation our legislature has provided for a quasi-judicial hearing on the question of necessity of the project and propriety of the particular taking before the power may be exercised. I refer to the requirement of such a hearing before the Board of Public Utility Commissioners in the case of electric, light, heat and power companies seeking to condemn any land or interest therein which may be reasonably

necessary for the distribution of electricity. R. S. 48:7-3 and 4. This the legislature may require if it believes it wise to do so, but it is not constitutionally required.

However, the affected property owner must be given the opportunity to raise and have determined at an appropriate judicial hearing those questions which are justiciable as previously outlined, as well as, of course, at a later date the question of the amount of compensation and damages to be paid. This is so whether the particular statute provides for or makes mention of it or not. This opportunity is afforded under our law by the provisions of the (18) Eminent Domain Act, R. S. 20:1-2, as amended by the Laws of 1953, Chapter 20, and of R. R. 4:85. The defendants here have had such a hearing—i.e., that in which we are now engaged. Such satisfies all constitutional requirements. I hold that the defendants' third objection is without merit.

Defendants' second objection is somewhat novel. As I understand it, they contend that the statute is, on the one hand so vague and uncertain with respect to the limits of the area which may be taken and the future general scope and purpose of the proposed use, and on the other hand, so precise and limiting with reference to the source of the water to supply the future system, that the Commissioner is given what amounts to no guidance or standards for the exercise of his judgment and that consequently any exercise thereof by him must be held in legal effect to amount to an abuse of discretion and an excessive exercise of power.

All delegation statutes in the (19) eminent domain field are necessarily broad and somewhat vague since it is obviously impractical or impossible for the legislature to prescribe in advance the precise amount or location of property and the like to be taken to carry out the statutory design. City of Newark versus New Jersey

Turnpike Authority, supra. I know of no statute that has ever been stricken down in this State on this ground.

Vagueness and indefiniteness in many aspects are unavoidable when dealing with the acquisition of land to make possible some future project not yet definitely outlined and to be undertaken at an undetermined future date, but which the legislature has determined is necessary now insofar as the acquisition of land is concerned to safeguard the public weal for the future. If present detailed precision was required, before the power could be exercised, the legislative obligation to protect now the public interest in years to come would be completely thwarted.

This is particularly true when we are dealing with provision for an (20) adequate water supply for a people of a growing state already in need of additional sources and systems. Such enterprises by their very nature require large amounts of naturally suitable lands in rural or relatively undeveloped areas for reservoirs and other works which must be at least close enough to possible sources of water to be practically useful. The exact nature of the system and works to be utilized cannot necessarily be determined at the time of the taking. Such depend to a great extent on many factors unknown or uncertain at that time. But again such a situation cannot be permitted to thwart the legislative finding and declaration of a necessary public use and purpose even if it be in futuro.

Our courts have long since recognized this problem in condemnation proceedings to acquire lands for future water supplies and systems and have been outspoken in sustaining as valid exercises of the power of acquisition for such future purposes. Olmsted versus Proprietors of the Morris Aqueduct, supra; Kountze versus Morris Aqueduct (21), 58 N.J.L. 303 (Supreme Court 1895),

affirmed 58 N.J.L. 695 (Court of Errors and Appeals 1896), which were condemnation cases involving private water companies.

In the Olmsted case the Court at page 329 said:

> "It is impossible to estimate with precision the quantity of water that will be needed to supply the wants of a population of about six thousand; nor can it be computed with accuracy what the supply of water will be from the district hitherto relied upon. In a matter of such extreme necessity, all contingencies must be provided for, and the supply should be so ample that a lack of water could not be reasonably apprehended."

So I conclude that it is no objection on any ground that the statute refers to "the future establishment of a water system." This expression is sufficiently definite under the circumstances to serve as an adequate guide or criterion for the Commissioner. He does not have to know or (22) be told by the legislature what kind of a system is ultimately to be established in order for the exercise of his judgment in acquiring lands to be validy based.

The statute says he shall acquire "such part of the area commonly known as Round Valley, located in Hunterdon County", which in his judgment shall be appropriate and useful.

The evidence before me, which constituted, in part at least, the data on which the Commissioner based the exercise of his judgment to acquire the lands which he has determined to take, clearly shows that Round Valley is a well known and recognized area by reason of being quite definitely definable in the physical and geographical sense and the legislature must be presumed to have had than knowledge. It is a natural basin, roughly circular

in shape, bounded on the north, west and south by the horsehoe shaped Cushetunk Mountain which rises quite sharply to a generally regular elevation of 700 to 880 feet. The irregular and less sharply defined hills on the west end are (23) of lesser height, running four to 500 feet in elevation. Two small streams originating in the valley flow through slight gaps in the north and south walls, running in those respective directions. The oval shape of the valley floor is about 2.6 miles long by 1.5 miles wide. Cushetunk Mountain is composed entirely of trap rock. A better reservoir created by nature could hardly be imagined, made complete by dams erected at the north and south gaps. The source of water would have to be outside of valley.

The precise area had long been recognized as a possible reservoir site. The first reference in the record before me is a topographical study made in 1929 by the State Water Policy Commission, predecessor of the present Division of State Water Policy and Supply in the Commissioner's department, the study apparently having been made pursuant to the statutory obligation to investigate and study the water resources of the State for conservation, development, regulation and use. R. S. 58:1-11.

(24) In 1954 the North Jersey District Water Supply Commission published a detailed study called the "Round Valley Project" and in 1955 this Commission sought approval in a proceeding before the Division, to acquire and develop the valley for a water supply system for its customer municipalities. It proposed a land taking generally like that now being followed by the Commissioner.

The Legislative Commission on Water Supply, created by Joint Resolution No. 3, approved March 18, 1955 (Laws of 1955 at page 1009), in a preliminary report to the legislature made later that year, recommended the

passage of a then pending bill to acquire Round Valley as an insurance measure for a reservoir site before increasing settlement of the area made the cost of acquisition much higher.

The Tippetts, Abbett, McCarthy, Stratton Survey of New Jersey Water Resources Development dated December, 1955, made for the Legislative Commission, throughly considered and reported on the use of the valley as an integral part of a new water supply (25) system for the northeastern part of the State under alternative plans using water from the South Branch of the Raritan River, from the Delaware River, or a combination of both, and its projected plans in the survey generally indicated the acquisition of land to the limit the Commissioner is now doing.

The legislature had this survey before it, as well as its Commissioner's recommendation, when it passed the statute in question. The Commissioner had and utilized all of the above information in determining the exercise of his judgment. All the data clearly shows a sufficiently definite area known as Round Valley which is an adequate guide for the Commissioner and his takings do not go beyond that area. Certainly legislative authority to take "such part" of the area does not preclude taking all or substantially all of it.

On the north, west and south he is taking all land in the basis plus the sides of Cushetunk Mountain to property lines which quite regularly run along the (26) crest. In the west he is taking land which includes sufficient of the lower hills to complete the circular bowl. All this will obviously permit the largest possible reservoir, even though the ultimate use may be decided to be for a less deep or high storage not utilizing the full height of the mountain. I feel he would well be subject to criticism if he did not take all that he is taking, espe-

cially when the outer boundary lines generally run along the crest. I find, as to the area involved, that the legislative standards or criteria are sufficient and that there has been no abuse of discretion in applying them generally.

It is suggested that the limitation in the Act to the Delaware River water as to the source of the proposed water supply in some way restricts the acquisition of land to less than that being taken and makes the Commissioner's takings generally excessive since by presently operative decree of the United States Supreme Court, New Jersey may only take 100 million gallons of Delaware (27) River water per day for out of basin uses and commitments already made out of this quantity reduce the remaining amount available for any system at Round Valley to a figure which would only permit a much smaller reservoir. But again it is a future system which is being provided for and it seems to me that the Commissioner not only has the power but is duty bound to acquire the maximum amount of land so long as it is in the valley area. The Court may at some later date allow New Jersey to take more, or other means may be devised or adopted to acquire the use of more of the water for storage here.

All in all I see nothing so vague or indefinite, or on the contrary so limiting, in Section 1 of the Statute as to invalidate it and nothing in the Commissioner's determination to take which can be said to even approach as to the whole area of the taking, an excessive use of power or abuse of discretion, assuming the latter concepts to be properly justiciable questions in this action.

Defendants' objection to the (28) constitutionality of the appropriation section—Section 7, raises an entirely different question. By that section there was appropriated to the department for the purposes of the Act a maximum of $3,000,000 from the Veterans Loan Guaranty

and Insurance Fund established pursuant to Chapter 126 of the Laws of 1944.

By this Chapter (N.J.S. 38:23B-1 et seq.) the legislature created in this department a separate body corporate and politic called the Veterans Loan Authority, generally to guarantee certain loans to be made by lending institutions to veterans. It provided for an original capitalization of $5,000,000, later increased to $11,000,000 to be subscribed by the State Treasurer, and which was thereby appropriated out of the "Post-War Reserve Account of the General State Fund or the balance held as reserve for post-war needs or to meet expenditures of an emergency nature in the State Highway System Fund."

It is to be noted that this original appropriation to the fund, to the (29) authority, thus came out of special and not general state funds. This capital and other authority revenues were directed to be held in trust in a veterans loan guaranty and insurance funds to meet the obligations of the authority. Another special and dedicated fund was thereby created. Section 5 of the Authority Act then provides "but any amounts in the fund in excess of the total amount of guaranteed or insured loans outstanding at any time shall be subject to such disposition as may be provided by law." This amounts to a reservation in the legislature to appropriate such excess for other purposes, and this reservation was exercised in part at least by the appropriation section of the Round Valley Act.

This section contains an express legislative finding that the $3,000,000 in question "is in excess of the total amounts of guaranteed or insured loans outstanding now or hereafter as obligations of the Veterans Loan Authority." I believe I am entitled to presume the legislature knew what it was (30) doing and saying when it made this finding of excess moneys available. That the purpose of

the Authority has been largely served and its operations largely concluded is evidenced by N.J.S. 38:23B-22.2, enacted before the Round Valley Act, transferring all of the Authority's powers, duties, trust funds, property and the like to the Department of Law and Public Safety as of June 30, 1958, with a direction to the Attorney-General to thereupon, as speedily as possible, complete any and all unfinished transactions and wind up its affairs. Moreover there is no evidence before me that the $3,000,000 is not excess and is not available. Therefore, I feel bound by the legislative declaration and findings.

Defendants urge that the appropriation is violative of Article 8, Section 2, Paragraph 2, 1957 Constitution, reading as follows:

> "No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other (31) State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year; except that when a change in the fiscal year is made, necessary provision may be made to effect the transition.
>
> "No general appropriation law or other law appropriating money for any State purpose shall be enacted if the appropriation contained therein, together with all prior appropriations made for the same fiscal period, shall exceed the total amount of revenue on hand and anticipated which will be available to meet such appropriations during such fiscal period, as certified by the Governor."

It is contended that there has been no certification by the Governor here that this appropriation, together with all prior appropriations for State purposes made for fiscal

year, does not exceed the total amount of revenue on hand and anticipated (32) which will be available to meet such appropriations during the fiscal year. I am assuming that there was no such certification made by the Governor.

But I conceive that none was required since it seems to me quite obvious that the constitutional provision was not intended to and does not apply to an appropriation for a special purpose lawfully made out of a special dedicated fund subject to no prior appropriations or uses and not made out of the general State funds which latter are, of course, those available and used for general State appropriations theretofore made.

I can see no purpose to be served in line with the general intention of the constitutional paragraph by requiring the Governor's certificate in such a situation as here. It has no relation to the evils sought to be prevented by the requirements of the paragraph. The situation would, of course, be different if the legislature had previously transferred the excess in the Veterans Loan Authority fund to the general (33) State fund. I hold that the appropriation section is valid.

Defendants' final challenge is to the authority or right of the special counsel for the Commissioner to bring this suit. Section 3 of the Act says that the Attorney-General shall represent the State and the Commissioner in the event of condemnation proceedings.

Section 6 provides, to repeat which I have said before, that "No part of funds appropriated by this act shall be used for any purpose other than for payment of the cost of acquisition of real property by purchase or condemnation award, expenses incurred for the examination of title to the property to be acquired and for expert appraisals and testimony with regard as to the value of property to be acquired."

Exhibit "B"

The complaint here is signed in the name of the Attorney-General by the special counsel as such. Concededly the latter was designated by the Attorney-General with the approval of the Governor as required by N.J.S. 52:17A-13 which provides:

> (34) "No special counsel shall be employed for the State or for or by any officer, department, board, body, commission or instrumentality of the State Government except by authority of the Attorney-General, and then only with the approval of the Governor, and provide that appropriations have been made therefor, unless the matter be of such an emergency and shall be so declared by the Governor."

It is contended that Section 3 of the Round Valley Act is a legislative declaration that no special counsel may be appointed by the Attorney-General in connection with this statute, but that he must do the condemnation work himself and in any event any such appointment is invalid for want of required appropriation therefor since Section 6 by implication excludes the use of the funds to pay special counsel.

The argument to the contrary by plaintiff is persuasive under the familiar rules of statutory construction, although not entirely free from doubt in (35) my mind, but even if defendants' interpretation were sound, which I do not find it necessary to decide, I am of the opinion that they cannot raise the point for the purpose of attempting to secure a dismissal of the action. Clearly this is not a case where the action was started by special counsel in fact without the authority of the plaintiff. The contrary is clearly true. Defendants are therefore not in any way prejudiced. See Driscoll versus Burlington Bristol Bridge Company, 8 New Jersey Reports 433 (1952). The Court is not here called upon to decide whether special counsel is entitled to be compensated or from what source.

So plaintiff is entitled to a judgment for the appointment of Commissioners. Such a judgment will be prepared by plaintiff's attorney, submitted for approval as to form by defendants' attorney, and if it cannot be agreed upon as to form it can be noticed for settlement before me on any motion day. The judgment may recite the determination of the issues raised by the answer for the (36) reasons and on the findings and conclusions expressed in this oral opinion.

I understand that the Commissioner, as his counsel has advised me in other cases in connection with this Round Valley Acquisition, does not desire to suggest to the Court the names of any persons for commissioners. If the defendants wish to do so I shall be glad to receive them. It is, of course, the obligation and responsibility of the Court to appoint the commissioners, but I am glad to have any suggestions from either side.

Exhibit "C"

Statutes and Amendments Thereto Involved

SENATE, No. 304

STATE OF NEW JERSEY

INTRODUCED MAY 17, 1956

By Mr. McCay

(Without Reference)

AN ACT authorizing and directing the Commissioner of Conservation and Economic Development to acquire certain property in the name of the State for water supply and other public purposes and making an appropriation therefor.

WHEREAS, It has been long recognized that additional supplies of water will be needed to meet the future requirements of the people of the State; and

WHEREAS, To meet this need, various proposals have been made for the creation of new water supply systems and, in particular, the projects for the establishment of a water supply system to be known as the Round Valley Water Supply System, for the use of the Delaware river waters; and

WHEREAS, It is advisable to authorize the acquisition of certain real property which will be needed for additional water supply systems, without awaiting the enactment into law of such statutes as may be necessary to specifically create and establish new and additional water supply systems; now, therefore,

Exhibit "C"

BE IT ENACTED BY THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY:

1. The Commissioner of Conservation and Economic Development is authorized and directed to acquire, in the name of the State, within 2 years from the effective date of this act, such part of the area commonly known as Round Valley, located in Hunterdon County, which in the judgment of the commissioner is appropriate and useful for the future establishment of a water supply system the source of which shall be solely the Delaware River, exclusive of its tributaries.

2. Acquisition of said real property authorized and directed by this act may be made by purchase or by the exercise of the power of eminent domain, pursuant to the provisions of chapter 1 of Title 20 of the Revised Statutes.

3. In the event of condemnation proceedings pursuant to this Act, the Attorney-General shall represent the State and the Commissioner of Conservation and Economic Development.

4. Real property acquired pursuant to this act shall be held primarily for use in connection with a water supply system the source of which shall be solely the Delaware River, exclusive of its tributaries, but shall also be made available, as a State reservation, for recreational and other State uses consistent with its primary use, in accordance with rules and regulations to be promulgated by the Commissioner of Conservation and Economic Development.

5. To the end that municipalities may not suffer loss of taxes by reason of the acquisition and ownership by the State of New Jersey of property therein, the State Treas-

urer upon certification of the Commissioner of Conservation and Economic Development shall pay annually to each municipality in which property is acquired pursuant to this act a sum equal to that last paid as taxes upon such land for the taxable year immediately prior to the time of its acquisition.

The State Treasurer shall also pay to any county or municipality the cost of relocating any municipal or county roads made necessary by reason of the acquisition or use of property pursuant to this act.

6. No part of funds appropriated by this act shall be used for any purpose other than for payment of the cost of acquisition of real property by purchase or condemnation award, expenses incurred for the examination of title to the property to be acquired and for expert appraisals and testimony with regard as to the value of property to be acquired.

7. There is hereby appropriated to the Department of Conservation and Economic Development for the purposes of this act, $3,000,000, or so much thereof as may be needed, from the Veterans Loan Guaranty and Insurance Fund established pursuant to chapter 126 of the laws of 1944, as heretofore amended, which is in excess of the total amounts of guaranteed or insured loans outstanding now or hereafter as obligations of the Veterans Loan Authority created pursuant to said chapter.

8. This act shall take effect immediately.

Approved June 1, 1956
Laws of 1956 Chapter 60 (N.J.S.A. 58:20-1 et seq.)

Exhibit "C"

SENATE, No. 304

CHAPTER 215

An Act to amend "An act authorizing the directing the Commissioner of Conservation and Economic Development to acquire certain property in the name of the State for water supply and other public purposes and making an appropriation therefor," approved June 1, 1956 (P. L. 1956, c. 60).

BE IT ENACTED BY THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY:

1. Section 1 of the act of which this act is amendatory[54] is amended to read as follows:

1. The Commissioner of Conservation and Economic Development is authorized and directed to acquire, in the name of the State, within 2 years from the effective date of this act, such part of the area commonly known as Round Valley, located in Hunterdon County, which in the judgment of the commissioner is appropriate and useful for the future establishment of a water supply system the source of which shall be ~~solely~~ either the Delaware river, exclusive of its tributaries, or the south branch of the Raritan river or both.

No water shall be pumped from the south branch of the Raritan river into a reservoir constructed in said area whenever the flow in said river is less than 40 million gallons daily at the United States Geological Survey stream gauging station at Stanton, or less than 70 million gallons daily at the United States Geological Survey stream

[54] N.J.S.A. 58:20-1

Changes or additions in text are indicated by underline

gauging station at Manville or less than 90 million gallons daily at the United States Geological Survey stream gauging station at Bound Brook, nor shall water be pumped from said river into such reservoir during the ~~months of June, July, August and September~~ period from June 15 to September 15 in any year.

Whenever the flow of water in the south branch of the Raritan river is less than 40 million gallons daily at the United States Geological Survey stream gauging station at Stanton, or less than 70 million gallons daily at the United States Geological Survey stream gauging station at Manville, or less than 90 million gallons daily at the United States Geological Survey stream gauging station at Bound Brook, a sufficient amount of water shall be released from such reservoir or from such other reservoir or reservoirs as may be constructed on the south branch of the Raritan river or its tributaries in such amounts as will maintain not less than the said flows of 40 million gallons daily at Stanton and 70 million gallons daily at Manville and 90 million gallons daily at Bound Brook, and such released water shall be returned to the south branch of the Raritan river at the point of diversion or pumping into such reservoir or at some point upstream thereof.

Upon the completion and placing in operation of such reservoir in the Round Valley area, not less than 830,000 gallons of water daily shall be released at all times into Prescott brook from such reservoir and at all times not less than 170,000 gallons of water daily shall be released into the south branch of the Rockaway creek from such reservoir.

2. Section 4 of the act of which this act is amendatory[55] is amended to read as follows:

[55] N.J.S.A. 58:20-4
deletions by ~~strikeouts~~

4. Real property acquired pursuant to this act shall be held primarily for use in connection with a water supply system the source of which shall be ~~solely~~ either the Delaware river, exclusive of its tributaries, or the south branch of the Raritan river or both, but shall also be made available, as a State reservation, for recreational and other State uses consistent with its primary use, in accordance with rules and regulations to be promulgated by the Commissioner of Conservation and Economic Development.

3. Section 5 of the act of which this act is amendatory[58] is amended to read as follows:

5. To the end that municipalities may not suffer loss of taxes by reason of the acquisition and ownership by the State of New Jersey of property therein, ~~at The,~~ the State Treasurer upon certification of the Commissioner of Conservation and Economic Development shall pay annually on October 1 to each municipality in which the property is acquired pursuant to this act ~~prior to the commencement of the actual construction of the water supply system,~~ (a) a sum equal to that last paid as taxes upon such land for the taxable year immediately prior to the time of its acquisition, and (b) in addition, for a period of 13 years beginning with the year 1958 the following amounts: in the first year a sum of money equal to that last paid as taxes upon improvements upon such land for the taxable year immediately prior to the time of its acquisition; and thereafter the following percentage of the amount paid in the first year, to wit, second year 92%; third year 84%; fourth year 76%; fifth year 68%; sixth year 60%; seventh year 52%; eighth year 44%; ninth year 36%; tenth year 28%; eleventh year 20%; twelfth year 12%; thirteenth year 4%.

[58] N.J.S.A. 58:20-5

deletions by ~~strikeouts~~

Exhibit "C"

b. Upon the commencement of such actual construction, the State Treasurer upon such certification shall pay to each said municipality during each of the first 15 years following such commencement a sum of money in lieu of taxes which sum shall be computed in each of said years and shall be in an amount equal to the product obtained by multiplying the assessed value of the land and improvements, if any, for the taxable year immediately prior to the time of its acquisition for water supply purposes by the rate of taxation of the year in which the computation is made, but in no case shall such sum be less than the amount of taxes paid upon such land and improvements, if any, for the said prior taxable year.

c. At the expiration of said 15 year period the State Treasurer upon such certification shall pay annually to each such municipality a sum of money in lieu of tax equivalent to the amount of taxes that would have been payable on such property if it had not been taken for water supply purposes, but in computing such sum the property shall be treated as though it were lands of private persons and also as though its use at the time of the taking had continued excluding however any improvements that were or are thereon.

All sums of money received by the respective municipalities as compensation for loss of tax revenue pursuant to paragraphs b, and c, of this section shall be applied to the same purposes as is the tax revenue from the assessment and collection of taxes on real property of the said municipalities, and to accomplish this end such sums shall be apportioned in the same manner as the general tax rate of the municipality for the tax year preceding the year of receipt. for all tax purposes the lands acquired for the said water supply system shall be deemed to be included in the ratables of the municipality to the same extent as though they had not been so acquired.

Exhibit "C"

The State shall be reimbursed for payments required to be made by this section ~~from the commencement of the actual construction of the water supply system~~ out of the proceeds received for the sale of water supplied by said system.

The State Treasurer shall also pay to any county or municipality the cost of relocating any municipal or county roads made necessary by reason of the acquisition or use of property pursuant to this act.

4. This act shall take effect immediately.

Approved and effective Dec. 26, 1957.

Exhibit "C"

CHAPTER 57

SENATE, No. 189

An Act to amend "An act authorizing and directing the Commissioner of Conservation and Economic Development to acquire certain property in the name of the State for water supply and other public purposes and making an appropriation therefor," approved June 1, 1956 (P. L. 1956, c. 60).

BE IT ENACTED BY THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY:

1. Section 1 of the act of which this act is amandatory[57] is amended to read as follows:

1. The Commissioner of Conservation and Economic Development is authorized and directed to acquire, in the name of the State, ~~within 2 years from the effective date of this act~~ on or before December 31, 1958, such part of the area commonly known as Round Valley, located in Hunterdon county, which in the judgment of the commissioner is appropriate and useful for the future establishment of a water supply system the source of which shall be either the Delaware river, exclusive of its tributaries, or the south branch of the Raritan river or both.

No water shall be pumped from the south branch of the Raritan river into a reservoir constructed in said area whenever the flow in said river is less than 40 million gallons daily at the United States Geological Survey stream gauging station at Stanton, or less than 70 million gallons daily at the United States Geological Survey Stream

[57] N.J.S.A. 58:20-1
deletions by ~~strikeouts~~

gauging station at Manville or less than 90 million gallons daily at the United States Geological Survey stream gauging station at Bound Brook, nor shall water be pumped from said river into such reservoir during the period from June 15 to September 15 in any year.

Whenever the flow of water in the south branch of the Raritan river is less than 40 million gallons daily at the United States Geological Survey stream gauging station at Stanton, or less than 70 million gallons daily at the United States Geological Survey stream gauging station at Manville, or less than 90 million gallons daily at the United States Geological Survey stream gauging station at Bound Brook, a sufficient amount of water shall be released from such reservoir or from such other reservoir or reservoirs as may be constructed on the south branch of the Raritan river or its tributaries in such amounts as will maintain not less than the said flows of 40 million gallons daily at Stanton and 70 million gallons daily at Manville and 90 million gallons daily at Bound Brook, and such released water shall be returned to the south branch of the Raritan river at the point of diversion or pumping into such reservoir or at some point upstream thereof.

Upon the completion and placing in operation of such reservoir in the Round Valley area, not less than 830,000 gallons of water daily shall be released at all times into Prescott brook from such reservoir and at all times not less than 170,000 gallons of water daily shall be released into the south branch of the Rockaway creek from such reservoir.

2. This act shall take effect immediately.

Approved and effective June 12, 1958.

Exhibit "C"

Introductory Statement

The extension of time, from June 6, 1958 to December 31, 1958, within which the Commissioner of the Department of Conservation and Economic Development is authorized and directed to acquire Round Valley becomes necessary to permit the acquisition of 5 small parcels of land necessary for reservoir purposes. The owners of these parcels could not be located notwithstanding extensive and diligent efforts to do so and condemnation has become necessary. The acquisition of all other land has been completed.

Exhibit "D"

Judgment of Supreme Court dated 12/2/57
First Appealed From

This matter having been instituted by Complaint and Order to Show Cause praying for the appointment of Commissioners for the condemnation of certain lands of defendants, copies of which were served upon the defendants; and defendants having served and filed an Answer denying the right of the plaintiff to the relief prayed for in the Complaint, and the Court having set down for hearing and heard the matter on presentation of evidence and argument on October 23, 1957, and the Court having examined the Briefs of counsel and considered the evidence and the argument of counsel submitted, and the Court having determined the issues raised by the Answer for the reasons and on the Findings and Conclusions expressed in the opinion of the Court made on November 1, 1957.

It is on this day of November, 1957, ADJUDGED

That the plaintiff is entitled to the relief prayed for in its Complant and that defendants' Answer and the separate defenses filed herein be and are hereby stricken; and it is further ADJUDGED

That Sidney Kirschen, William Herrmann and Richard Schomp three disinterested freeholders, residents of the County of Hunterdon, be and they hereby are appointed Commissioners to examine and appraise the lands and property described in the Complant aforesaid, and to assess the damages to be sustained by the taking and condemning of the lands and property for public use by the State of New Jersey, for the purposes set forth in the said Complaint, pursuant to Title 20 of the Revised Statutes of New Jersey; and it is further ADJUDGED

That said Commissioners file their report on or before the 1st day of February, 1958.

The Commissioner shall give at least 10 days written notice of date and place of this Hearing to all defendants.

FREDERICK W. HALL
J. S. C.

Exhibit "E"

Mandate on Judgment of Affirmance of Supreme Court dated June 27, 1958

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 2615

This cause having been duly argued before this Court by Mr. Burrell Ives Humphreys, counsel for the appellant Silvio A. Lanza and Mr. Bernard Hellring, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the twenty-seventh day of June, 1958.

JOHN H GILDEA
Clerk of the Supreme Court

A True Copy

JOHN H GILDEA
Clerk

FILED
Jun 27 1958

JOHN H GILDEA
Clerk

Exhibit "F"

Notice of Appeal Filed Sept. 22, 1958

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that SILVIO A. LANZA, the appellant above named hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey affirming a judgment of the Law Division of the Superior Court of the County of Hunterdon, appointing three Commissioners under R. S. 20:1-1 *et seq.* as amended by L. 1953, c. 20, to assess the damages to be sustained by the taking and condemning by the State of lands and property "deemed appropriate and useful for the future establishment of a water supply system," pursuant to P. L. 1956, c. 80 N.J.S.A. 56:20-1 *et seq.*, and striking out the defenses in the defendant's answer; entered in this proceeding in the Supreme Court on June 27th, 1958.

This determination by the Supreme Court was predicated on a certified appeal to the Appellate Division from the Law Division of the Superior Court, as aforesaid, certified *sua sponte* by said Supreme Court because of the timeliness and public nature of the questions presented.

This appeal also contemplates a reservation of all rights to review all subsequent determinations made in furtherance of and following said judgment of affirmance of the Supreme Court dated June 27th, 1958; including, but not limited to the order of the Supreme Court of the State of New Jersey filed August 1st, 1958 (Docket #2615); order of the Supreme Court of the State of New Jersey filed September 13th, 1958 (Docket #2615); the two separate orders of the Appellate Division (Docket #A640-57), signed by Hon. John B. McGeehan, J.A.D., both dated and filed August 29th, 1958; and the two separate orders of Hon. Alexander P. Waugh, a Justice of the Superior Court.

dated August 1st, 1958, filed August 4th, 1958 (Docket #L6044-57), including the order of the Appellate Division on motion to extend time to perfect the appeal, etc., in connection with pending application in that Court for such relief.

This appeal is taken pursuant to Title 25, U.S.C. par. 1257 (2) and par. 1257 (3).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Opinion and judgment of the Supreme Court of the State of New Jersey, dated and entered June 27, 1958, A-157-September Term 1957, Docket #2615-A221-57-L6044-57.

2. The complaint of the State of New Jersey filed June 10th, 1957.

3. The answer of the defendant-appellant filed September 19th, 1957.

4. Excerpts from testimony before Hon. Frederick W. Hall of October 23rd, 1957 set forth in defendant-appellant's appendix on appeal.

5. Oral opinion and decision of Hon. Frederick W. Hall dated November 1st, 1957.

6. The final judgment of the Superior Court, Law Division filed December 2nd, 1957 being original judgment appealed from.

7. Senate Bill No. 304, State of New Jersey, approved June 1st, 1956; P. L. 1956, c. 60.

8. Senate Bill No. 304, State of New Jersey, Chapter 215 of the Laws of 1957, approved December 26th,

Exhibit "F"

1957, amending Senate Bill 304 supra. (approved June 1st, 1956, P. L. 1956, c. 60.)

9. Chapter 57 of the Laws of 1956 being Senate Bill 189, approved June 12th, 1958, amending Senate Bill 304 supra. (approved June 1st, 1956, P. B. 1956, c. 60 aforementioned.)

10. Order of the Appellate Division of the Superior Court, restraining State of New Jersey until final determination, signed by Hon. Sidney Goldman, J.A.D., February 27th, 1958 (Docket #A221-57).

11. Temporary stay of the Appellate Division of the Superior Court under order of Hon. Joseph L. Smith, dated August 4th, 1958 (Docket #A64057) on appeal from several orders.

12. Papers used in connection with the application resulting in the two separate orders of the Supreme Court dated August 1st, 1958 and September 12th, 1958 respectively (Docket #2615).

13. Papers used in connection with the application resulting in the two separate orders of the Appellate Division of the Superior Court of Hon. John B. McGeehan, J.A.D., both dated and filed August 29th, 1958 (Docket #A640-57).

14. Papers used in connection with the application resulting in the two separate orders of the Superior Court of Hon. Alexander P. Waugh, both filed August 4th, 1958 (Docket #L6044-57).

15. Papers used by the State of New Jersey in connection with the motion and statement in support thereof for certification in the Supreme Court of the State of New Jersey, pursuant to R. R. 1:10-1a dated April, 1958 (Docket #2615, A640-57, L6044-57, A221-

57) and such other papers as were used as the basis of bypassing any consideration on the appeal pending in the Appellate Division of the Superior Court of the State of New Jersey.

16. Notice of appeal by Silvio A. Lanza appearing pro se dated December 26th, 1957, filed January 8th, 1958 (Docket #A640-57—Docket #L6044-57).

17. Notice of appeal, etc., dated August 2nd, 1958, filed in the Office of the Clerk of the Superior Court, Hunterdon County, on August 4th, 1958 (Docket #L6044-57).

(*)

III. The following questions are presented by this appeal:

* * * * * *

For items 1-11 hereof, see pages 3-5 —— *supra.*

Dated: September 19th, 1958.

VITO F. LANZA,
VITO F. LANZA,
Attorney for
Silvio A. Lanza, Appellant,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 532

SILVIO A. LANZA,

Appellant,

vs.

STATE OF NEW JERSEY, by JOSEPH E. McLEAN, Commissioner of Conservation and Economic Development,

Appellee.

MOTION TO DISMISS AND STATEMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PHILIP LINDEMAN II,
On the Brief.

TABLE OF CONTENTS.

	PAGE
MOTION TO DISMISS	1
STATEMENT OF OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
PRELIMINARY STATEMENT	2
COUNTER-STATEMENT OF THE CASE	3
ARGUMENT:	
I. The questions raised do not present substantial federal questions	4
II. If federal questions have been raised at all, they have previously been decided by this court adversely to appellant	6
III.—The questions presented by appellant were decided on an adequate non-federal basis	8
IV.—The federal questions, if any, were not properly or timely raised below	11
CONCLUSION	12
Prayer for Relief Under 28 U. S. C. A., Sec. 2103	13

Table of Cases.

PAGE

Aero Mayflower Transit Co. v. *Board of R. R. Commissioners of Montana*, 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947) 11

Black v. *Cutter Laboratories*, 351 U. S. 292, 76 S. Ct. 824, 100 L. Ed. 1188 (1956) 11

Bowe v. *Scott*, 233 U. S. 658, 34 S. Ct. 769, 58 L. Ed. 1141 (1914) 12

Bragg v. *Weaver*, 251 U. S. 57, 40 S. Ct. 62, 64 L. Ed. 135 (1919) 7

Campbell v. *City of Olney*, 262 U. S. 352, 43 S. Ct. 559, 67 L. Ed. 1021 (1923) 11

Contributors to the Pennsylvania Hospital v. *City of Philadelphia*, 245 U. S. 20, 38 S. Ct. 35, 52 L. Ed. 124 (1917) 8

Equitable Life Assurance Society of the United States v. *Brown*, 187 U. S. 308, 23 S. Ct. 123, 47 L. Ed. 190 (1902) is apposite, where, at 187 U. S. pp. 311-312 ..... 7, 8

Hirb. v. *Pitcairn*, 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789 (1945) 11

Joslin Mfg. Co. v. *Providence*, 262 U. S. 668, 67 L. Ed. 1167 (1923) 7

Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32, 48 S. Ct. 423, 72 L. Ed. 770 (1928) 11

Memphis Natural Gas Co. v. *Beeler*, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090 (1942) 5

Patterson v. *Stanolind Oil & Gas Co.*, 305 U. S. 376, 59 S. Ct. 259, 83 L. Ed. 231 (1939) 8

Rindge Company v. *County of Los Angeles*, 262 U. S. 700, 67 L. Ed. 1186 (1923) 7

Roe v. *Kansas ex rel. Smith*, 278 U. S. 191, 49 S. Ct. 160, 73 L. Ed. 259 (1929) 11

PAGE

Sears v. *Akron*, 246 U. S. 242, 62 L. Ed. 689 (1918) 7
Southwestern Bell Telephone Co. v. *Oklahoma*, 303 U. S. 206, 58 S. Ct. 528, 82 L. Ed. 751 (1938) 5
State v. *Lanza*, 27 N. J. 516 (1958) 6
Thomas v. *Iowa*, 209 U. S. 258, 28 S. Ct. 487, 52 L. Ed. 782 (1908) 5
Tidal Oil Co. v. *Flanagan*, 263 U. S. 444, 445 S. Ct. 197, 68 L. Ed. 382 (1923) 8
United States v. *Carmack*, 329 U. S. 230, 91 L. Ed. 209 (1947) 7
United States v. *Gettysburg Electric R. Co.*, 160 U. S. 668, 40 L. Ed. 576 (1896) 7
Whitney v. *California*, 274 U. S. 357, 47 S. Ct. 41, 71 L. Ed. 1095 (1927) 5
Williams v. *Kaiser*, 323 U. S. 47, 65 S. Ct. 363, 89 L. Ed. 398 (1945) 11

STATUTES.

Title 28 U. S. C. A., par. 1257(2) 2
Title 28 U. S. C. A., par. 1257(3) 2
Title 28 U. S. C. A. 2103 ..... 2, 13
United States Constitution:
Fourteenth Amendment 3, 4, 6, 7, 10, 11
New Jersey Constitution, 1947,
Article VIII, Sec. 2, Pars. 2, 3 ..... 9, 10
R. S. 58:20-3 N. J. S. A. 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No.

SILVIO A. LANZA,

Appellant,

vs.

STATE OF NEW JERSEY, by JOSEPH E. McLEAN, Commissioner of Conservation and Economic Development,

Appellee.

Motion to Dismiss.

Pursuant to Rule 16 of this court, Appellee hereby moves that the within appeal be dismissed on the grounds that it does not present a substantial federal question, that the federal question, if any, was not timely or properly raised, or expressly passed upon and that the judgment below rests on an adequate non-federal basis.

Statement of Opposition to Petition for Writ of Certiorari.

If the papers filed by appellant with this court be deemed to consitute a Petition for Writ of Certiorari appellee hereby opposes the same on the ground that they were not filed in accordance with Rule 21 of this court and that the New Jersey Supreme Court neither decided a federal question of substance not heretofore determined by this court nor decided any question in a way probably not in accordance with applicable decisions of this court.

Preliminary Statement.

On or about September 22, 1958, appellee was served with a paper entitled "Notice of Appeal to the Supreme Court of the United States" (Appellant's Statement as to Jurisdiction, pp. 62-65). Appellant stated therein (Appellant's Statement, etc., p. 63, l. 6) that the appeal "is taken pursuant to Title 25 U. S. C., par. 1257(2) and par. 1257(3)" (although appellant undoubtedly meant Title 28 U. S. C. A. etc.). Paragraph 1257(2) of Title 28 confers jurisdiction upon this court as to appeals from state courts wherein a state statute is drawn in question on the ground of its repugnancy to the Constitution, treaties or laws of the United States and the statute is upheld. Paragraph 1257(3) on the other hand confers jurisdiction upon this court to entertain Petitions for Writs of Certiorari under certain other circumstances. After having expressly invoked the certiorari paragraph, appellant proceeded to ignore Rules 21 subd. 1 and 23 subd. 2 of this court in that he failed to print, serve and file his briefs as required thereunder. Appellee urges that Title 28 U. S. C. A. 2103, permitting improvident appeals to be regarded as Petitions for Writs of Certiorari, should not apply in this case, in view of apellant's express invoking of Title 28 U. S. C. A. 1257(3), as aforesaid.

Assuming, however, that Title 28 U. S. C. A. 2103 is deemed to apply, appellee, nevertheless, submits that this court ought not to grant either the appeal or the Petition for Writ of Certiorari, and will address itself to both applications in this brief.

In the light of the foregoing confused application before this court on the part of appellant, appellee has both moved to dismiss the appeal and opposed the Petition for Writ of Certiorari.

Counter-Statement of the Case.

Appellant's Statement of the Case at pages 5 through 8 of his Statement as to Jurisdiction is generally accurate except for certain important and crucial factual errors.

In the first place, the complaint did not allege that which appellant reprinted at page 5 of his Statement. On the contrary, appellee filed and served an extensive complaint several pages in length. Appellant failed to make clear that he was merely paraphrasing the complaint. Be that as it may, the paraphrasing is, nevertheless, satisfactory for the purpose herein.

Secondly, the hearing at the trial level was in the *Superior* Court of New Jersey, Law Division, not the *Supreme* Court, Law Division (Appellant's Statement, etc., p. 6, l. 4). Next, the appellant did *not* demonstrate "that the Commissioner had arbitrarily acquired much more land than the State could use for a future water supply system. . . ." (Appellant's Statement, etc., p. 6, ll. 6-9). The appellant adduced no evidence whatever on this point and he was prevented from cross examining thereon, as he notes in his brief. (Appellant's Statement, etc., p. 6, ll. 16-32.)

Finally (although there are other minor errors), at page 7 of his Statement, commencing with the first full paragraph, appellant is not only argumentative, but he patently misstates the holding of the New Jersey Supreme Court below. That court did not find the provisions of the Round Valley Act to be "not repugnant to the Fourteenth Amendment to the United States Constitution", but rather that, as is clearly and unmistakably stated by Mr. Justice Heher for that court (Appellant's Statement, pp. 7-8 *passim*), under the Fourteenth Amendment to the Constitution, eminent domain is the power of the state to take lands for public use for which it must pay just compensation. No reference is made therein to the Round Valley Act itself.

Appellant fails to mention in his Statement of the Case that he did not specifically allege any repugnancy of the Round Valley Act to the United States Constitution until he moved before the New Jersey Supreme Court for a rehearing, which motion was denied by that Court without opinion. At page 5, lines 24-34 and page 6, lines 1-3, of his Statement as to Jurisdiction appellant states that his answer alleged certain deficiencies in the Round Valley Act and its application but he discloses that it is in the Third Separate Defense alone in which he alleges unconstitutionality of that act. Even there, however, he did not expressly allege that the Act was repugnant to the United States Constitution.

ARGUMENT.

I.

The questions raised do not present substantial federal questions.

Questions 1. and 2. (Appellant's Statement, etc., p. 3) generally ask if the Round Valley Act is not repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. Question 6. (Appellant's Statement, etc., p. 4) asks if the judgment of the ~~United States~~ New Jersey Supreme Court does not contravene the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. As to these, and also Questions 3, 4, 5, 7, 9, 10, and 11 (which are the rest of the appellant's Questions Presented) appellant has violated Rule 15, subd. 1(d) and Rule 23, subd. 1(f) of this court in that he has not specified the stage of the proceedings in the court of first instance, and in the appellate court at which, and the manner in which, the federal questions sought to be reviewed were raised, and

the method of raising them. Appellant has stated only that his Third Separate Defense alleged the Round Valley Act to be unconstitutional. (Appellant's Statement, etc., p. 5, l. 31.) Indeed, appellant failed in any and all stages of the proceedings below to raise a federal question. He did not specify that the question of any other alleged invalidity or deficiency was raised as to the statutes, treaties or Constitution of the United States at any stage in the proceedings.

Even assuming, however, that the said reference to the Third Separate Defense implies repugnancy to the United States Constitution, that and the bare allegation that the other Questions mention the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution are not sufficient to invoke the jurisdiction of this court. For example, in *Thomas* v. *Iowa*, 209 U. S. 258, 28 S. Ct. 487, 52 L. Ed. 782 (1908) Mr. Justice Moody, for the court, said, at 209 U. S. page 263:

> "A mere claim in the court below that there has been a denial of due process of law does not of itself raise a Federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment of the Constitution, [citing cases]."

It is well settled that appellant must show affirmatively from the record, not only that a federal question was presented in the court of highest jurisdiction below, but also that the decision of the federal question adversely to the appellant was necessary to the determination of the same. *Southwestern Bell Telephone Co.* v. *Oklahoma*, 303 U. S. 206, 58 S. Ct. 528, 82 L. Ed. 751 (1938); *Whitney* v. *California*, 274 U. S. 357, 47 S. Ct. 41, 71 L. Ed. 1095 (1927); *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090 (1942). Appellant's quotation at page

7 of his Statement as to Jurisdiction, of a part of the opinion of Mr. Justice Heher in the New Jersey Supreme Court, *State* v. *Lanza*, 27 N. J. 516 (1958) does not show that a federal question, necessary to the determination of the cause, was raised below. In that excerpt, the court states only that the law of eminent domain and the requirement to pay just compensation for lands taken are the law of the land and that the Fourteenth Amendment to the United States Constitution operates to protect the rights of citizens in that regard. Appellant never denied the right of eminent domain to exist, nor did he allege that the Round Valley Act would deny him just compensation. Mr. Justice Heher's reference to the Fourteenth Amendment and to certain United States Supreme Court opinions is mere dictum and is intended only as background for his later holding that delegation of authority by the legislature to an administrative office to implement an acquisition of lands is valid under New Jersey authorities (Appellant's Statement, etc., Exhibit "A", p. 24, ll. 24-34).

II.

If federal questions have been raised at all, they have previously been decided by this court adversely to appellant.

Question 4. (Appellant's Statement, etc., p. 3) asks if the delegation of authority to the Commissioner of Conservation and Economic Development is not an unlawful delegation of legislative authority repugnant to the Fourteenth Amendment of the United States Constitution. Appellee urges that the presentation of this Question is as specious as it is irresponsible. Appellant obviously has undertaken no research into the authorities on this

point, for he cites no case to support him. Indeed, had he done so, he would have found the law to be squarely against him. Similarly, as to Question 5 (Appellant's Statement, etc., p. 3), the only question as to which "unconstitutionality" is alleged, appellant has no authority to support him. He inquires, in Question 5, whether or not the Round Valley Act violates the Fourteenth Amendment because he was not given an "opportunity to be heard". This court has previously decided many times that such delegation of authority by the Legislature is valid and that the property owner is not entitled to be heard (except, of course, as to the question of receipt of just compensation, which is not in issue herein). For example, in *Bragg* v. *Weaver*, 251 U. S. 57, 40 S. Ct. 62, 64 L. Ed. 135 (1919), this court held, at 251 U. S. p. 58:

> "When the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment [citing cases]."

See also, *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668, 67 L. Ed. 1167 (1923); *United States* v. *Carmack*, 329 U. S. 230, 91 L. Ed. 209 (1947); *Rindge Company* v. *County of Los Angeles*, 262 U. S. 700, 67 L. Ed. 1186 (1923); *Sears* v. *Akron*, 246 U. S. 242, 62 L. Ed. 689 (1918); *United States* v. *Gettysburg Electric R. Co.*, 160 U. S. 668, 40 L. Ed. 576 (1896).

In that these questions have so frequently and exhaustively been decided by this court before, appellant may not assert them again in order to confer jurisdiction upon this court. To this effect, the opinion of *Equitable Life Assur-*

ance Society of the United States v. *Brown*, 187 U. S. 308, 23 S. Ct. 123, 47 L. Ed. 190 (1902) is apposite, where, at 187 U. S. p. 311 the court held:

> "But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real substantive question on which the case may be made to turn,' that is, 'a real, and not a merely formal, Federal question is essential to the jurisdiction of this court.' Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail."

See also *Contributors to the Pennsylvania Hospital* v. *City of Philadelphia*, 245 U. S. 20, 38 S. Ct. 35, 52 L. Ed. 124 (1917); *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 445 S. Ct. 197, 68 L. Ed. 382 (1923); *Patterson* v. *Stanolind Oil & Gas Co.*, 305 U. S. 376, 59 S. Ct. 259, 83 L. Ed. 231 (1939).

III.

The questions presented by appellant were decided on an adequate non-federal basis.

As for Appellant's Questions 3, 9, 10, and 11 (Appellant's Statement, etc., pp. 3, 4 and 5), appellee submits that appellant imposes upon this court in asking it to consider them. They are questions exclusively within the fabric of New Jersey statutory and constitutional law and have no relevance in this proceeding whatever.

Question 3 concerns Article VIII, Sec. 2, Par. 3 of the New Jersey Constitution, 1947, which provides as follows:

> "The Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year, unless the same shall be authorized by a law for some single object or work distinctly specified therein. Regardless of any limitation relating to taxation in this Constitution, such law shall provide the ways and means, exclusive of loans, to pay the interest of such debt or liability as it falls due, and also to pay and discharge the principal thereof within thirty-five years from the time it is contracted; and the law shall not be repealed until such debt or liability and the interest thereon are fully paid and discharged. No such law shall take effect until it shall have been submitted to the people at a general election and approved by a majority of the legally qualified voters of the State voting thereon. All money to be raised by the authority of such law shall be applied only to the specific object stated therein, and to the payment of the debt thereby created. This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States. Nor shall anything in this paragraph contained apply to the creation of any debts or liabilities for purposes of war, or to repel invasion, or to suppress insurrection or to meet an emergency caused by disaster or act of God."

The New Jersey Supreme Court found the Round Valley Act not to violate said provision (Appellant's Statement, etc., Exhibit "A", pp. 16-20) and supported its opinion with New Jersey authorities alone. Appellant apparently

has ignored this question in the argument in his Statement as to Jurisdiction, for he has not mentioned it nor has he cited any authority to demonstrate the federal question.

Question 9 also refers to the New Jersey Constitution. It suggests that the Round Valley Act appropriated funds for the acquisition which were not certified by the Governor to be on hand, pursuant to New Jersey Constitution, 1947, Art. VIII, Sec. 2, Par. 2. In its opinion (reprinted at Appellant's Statement, etc., page 28 Exhibit "A") the highest court of New Jersey pointed out that appellant had not adduced any proof that the Governor had not certified the funds to be on hand and stated further that the appropriate Governor's budget message shows that the funds were in fact on hand. No federal question can remotely be contrived on this point.

Similarly, questions 10 and 11 dealing with the authority of counsel trying this case and the officer in whose name, on behalf of the State, the action is brought are purely state issues. The latter question was never raised in the proceedings below, nor does appellant attempt to show the same. His assertion, moreover, that it violates the 14th Amendment of the United States Constitution is not argued in his Statement as to Jurisdiction and is absurd. As for the authority of counsel to represent the state under R. S. 58:20-3 N. J. S. A., the absence of a federal question is also manifest, but in addition the New Jersey Supreme Court (Appellant's Statement, etc., Exhibit "A", pp. 27-28) found the authority valid although the issue was collateral to the case *at bar*. Only New Jersey authorities are cited by the court on this point.

With respect to Question 7 which suggests repugnancy to the 14th Amendment of the United States Constitution on the ground that the New Jersey courts had no right to strike appellant's answer and appoint Commissioners

because statutory authority had expired, this question, again, was not raised below. Also the applicability hereto of the federal Constitution in its entirety (much less to its 14th Amendment) is completely absent. Appellant has not, and cannot cite any authority for his position in this regard.

Appellee submits that this court is bound by the construction given by the New Jersey courts to its own statutes and to the validity of such statutes under the New Jersey Constitution. *Aero Mayflower Transit Co.* v. *Board of R. R. Commissioners of Montana*, 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947); *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 48 S. Ct. 423, 72 L. Ed. 770 (1928); *Campbell* v. *City of Olney*, 262 U. S. 352, 43 S. Ct. 559, 67 L. Ed. 1021 (1923). And see *Roe* v. *Kansas ex rel. Smith*, 278 U. S. 191, 49 S. Ct. 160, 73 L. Ed. 259 (1929). Appellee respectfully submits, therefore, that this court would not intrude upon the province of the New Jersey Courts as to Questions 3, 7, 9, 10, and 11. Similarly this court should not pass on federal questions *discussed* in the opinion below, where it appears that the judgment rests upon adequate State grounds. *Black* v. *Cutter Laboratories*, 351 U. S. 292, 76 S. Ct. 824, 100 L. Ed. 1188 (1956); *Herb.* v. *Pitcairn*, 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789 (1945); *Williams* v. *Kaiser*, 323 U. S. 47, 65 S. Ct. 363, 89 L. Ed. 398 (1945).

IV.

The federal questions, if any, were not properly or timely raised below.

It is well settled that where a party has not raised the federal question prior to a final determination by the State court of highest jurisdiction, he may not raise it in this court. That a party may raise such question in an applica-

tion for rehearing in such state court, as appellant attempted in this instance and which application was denied without opinion, is not sufficient. *Bowe* v. *Scott*, 233 U. S. 658, 34 S. Ct. 769, 58 L. Ed. 1141 (1914).

Conclusion.

Appellee respectfully urges that no substantial federal question was raised by appellant, that the attempt by appellant to raise such a question in his petition for rehearing below was not timely, that appellant failed properly in his attempt to raise such question at various stages below before the final judgment by the New Jersey Supreme Court in that he did not refer specifically to the United States Constitution, and finally that the judgment below rests on an adequate non-federal basis. For the foregoing reasons, appellee respectfully prays this court to dismiss the appeal.

If Appellant is deemed to have petitioned for a Writ of Certiorari, appellee respectfully urges this court to deny the same, based upon the foregoing in that the federal questions raised, if in fact they *were* raised, were previously decided by this court.

Prayer for Relief Under 28 U. S. C. A., Sec. 2103

Appellee prays this court to award it reasonable damages and double costs as permitted under 28 U. S. C. A., Sec. 2103, on the ground that the within appeal is wholly without merit, is frivolous, capricious and irresponsible and is designed to delay and harass appellee.

In support of this application appellee invites the attention of the court to the wholly inadequate brief filed by appellant. He has presented 11 questions for the consideration of this court, of which numbers 3, 7, 9, 10, and 11 are exclusively State questions as to which he did not even attempt to show any federal applicability. Questions 1, 2 and 6 are repetitive of one another and are vague, indefinite, and over-general. Questions 4, 5, and 8 were so frequently and conclusively decided previously by this court as to constitute a flagrant imposition upon this court and upon appellee as well.

If appellant made a study of the authorities in preparation of his Statement as to Jurisdiction, the product does not so indicate. Of the twelve cases listed as those cited at page 2 of his index, nine are included in the quoted excerpt from Mr. Justice Heher's opinion for the New Jersey Supreme Court below (Appellant's Statement, etc., p. 7) and are not elsewhere cited independently by appellant. A tenth case is that of the lower court opinions of the case at bar. The last two are New Jersey decisions, to wit, *Jamonneau* v. *Local Gov. Bd.*, 6 N. J. 281 (1951) and *City of Newark* v. *N. J. Turnpike Authority*, 7 N. J. 377, (1951), App. Dis. 342 U. S. 874. Both of these cases are cited for propositions wholly apart from the so-called federal questions raised by appellant.

It is significant that appellant has not cited *one* case of this court or indeed of any other court supporting his various and ill defined applications.

Respectfully submitted,

DAVID D. FURMAN,
Attorney General of New Jersey,
Attorney for Appellee.

By BERNARD HELLRING,
Special Counsel.

PHILIP LINDEMAN II,
On the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No. 532

SILVIO A. LANZA,

Appellant,

vs.

STATE OF NEW JERSEY, By JOSEPH E. McLEAN,
Commissioner of Conservation and Economic Development,

Appellee.

APPELLANT'S REPLY STATEMENT

VITO F. LANZA,
Counsel and Attorney for Silvio A. Lanza,
Appellant.

THOMAS F. GRIMES, Esq.,
On the Brief.

INDEX

Cases Cited

	PAGE
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389 (1924) ..	3
Interstate Amusement Co. v. Albert, 239 U. S. 560 (1916);	3
N. Y. Electric Lines v. Empire City Subway Co., 235 U. S. 119 (1914)	3
Northern Pac. Ry. Co. v. North Dakota, 236 U. S. 585 (1915)	3

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

SILVIO A. LANZA,

Appellant,

vs.

STATE OF NEW JERSEY, by JOSEPH E. McLEAN, COMMISSIONER OF CONSERVATION and ECONOMIC DEVELOPMENT,

Appellee.

APPELLANT'S REPLY STATEMENT

(I)

The appellee's Motion to Dismiss and Statement in Opposition charges that the above-entitled appeal is wholly without merit, frivolous, capricious and irresponsible, and designed to delay and harass appellee. The foregoing charges against the appellant and his counsel are, however, not justified by the facts. The questions raised by the appellant received extended discussion in the opinion of Justice Hall in the trial court, which opinion occupies nineteen pages in the appellant's Jurisdictional Statement herein (Exhibit "B", pp. 29-48). The Supreme Court of New Jersey considered the questions presented to be issues of public importance, because, of its own motion, the Supreme Court certified to itself the appeal that the appellant herein had taken to the intermediate appellate tribunal.

After the New Jersey Supreme Court had decided the case in an opinion by Mr. Justice Heher that is printed at pages 13-28 of the appellant's Jurisdictional Statement, the appellant was unable to obtain a stay either from the New Jersey courts or from this Court. The appellee notified appellant to remove from the property in question and proceeded with the trial of the above-entitled action before the Superior Court in Morris County, New Jersey. The trial of the above-entitled action is still in progress and has not been delayed by the appellant because of the pendency of this appeal in this Court. On the contrary, however, the appellee has not diligently proceeded with the presentation of its case.

Consequently, appellee's assertions that the appellant's case is wholly without merit and has been brought up for review solely for purposes of delay and harassment is not in accord with the facts.

It may be well to add that when the action herein came on for trial before the Superior Court in Morris County, the appellant, by appropriate motions to dismiss, raised again for the record all the questions presented on this appeal. However, because the judgment already entered herein may be deemed a final determination on the questions considered by the New Jersey courts herein, even though the trial of this action is still in progress, the appellant prosecuted this appeal in order to protect his right to a review in this Court.

These and other questions, including the impairment of the privileges and immunities of the appellant as a citizen of the United States, the 14th Amendment and possible illegal use of Delaware River waters in contravention of the prior decisions of this Court; are presented as issues that now stand resolved under the Judgment below contrary to Federal Statutes and Authorities.

(II)

Moreover, it is not true, as appellee argues at pages 6-8 of its Statement, that the questions presented have already been decided adversely to appellant by the United States Supreme Court. The appellee brought this action, as appellant has already pointed out, not under the general condemnation law of the State of New Jersey, but under a special act, the so-called "Round Valley Act", tailored by the Legislature solely to fit a particular local situation. This special act, the appellant believes, is so badly drawn as to vest an arbitrary power to condemn in the commissioner of conservation and economic development. Whether or not appellant's challenge of the special statute is sound presents questions which have not been passed upon by this Court and which require examination both of the facts involved and of the applicable state law. Such issues justify an appeal to this Court.

N. Y. Electric Lines v. *Empire City Subway Co.*, 235 U. S. 119 (1914);
Northern Pac. Ry. Co. v. *North Dakota*, 236 U. S. 585 (1915);
Interstate Amusement Co. v. *Albert*, 239 U. S. 560 (1916);
Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389 (1924).

Respectfully submitted,

VITO F. LANZA,
Counsel and Attorney for Appellant.

THOMAS F. GRIMES, Esq.,
On the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No. 532

SILVIO A. LANZA,

Appellant,

vs.

STATE OF NEW JERSEY, By JOSEPH E. McLEAN,
Commissioner of Conservation and Economic Development,

Appellee.

PETITION FOR REHEARING

VITO F. LANZA,
Attorney and Counsel for Appellant
Silvio A. Lanza.

INDEX

	PAGE
The Prior Proceedings	1
The Decision of This Court	2
Statement of Facts Relating to This Application for Rehearing	2
The Basis of This Application for a Rehearing	4
POINT I—The motion for rehearing should be granted and the appeal held until the determination of the proceedings before the Superior Court of New Jersey	5
POINT II—A substantial ground of appeal is available to appellant, although not previously presented	6
Conclusion	6
Certificate of Counsel	7

CASES CITED

Bragg v. Weaver, 251 U. S. 577	6
Massey v. United States, 291 U. S. 608	4
Sanitary Refrigerator Co. v. Winters, 280 U. S. 30, 34, footnote 1	4
Schriber-Schroth Co. v. Cleveland Trust Co., 305 U. S. 47, 50	5

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Appellee.

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Silvio A. Lanza, the above-named appellant, hereby respectfully applies, pursuant to Rule 58, subd. 1, of the Rules of this Court, for a rehearing of the above-named appellee's motion to dismiss the appellant's appeal heretofore taken as of right to this Court.

The Prior Proceedings

On or about September 22, 1958 the appellant took an appeal as of right to this Court from the judgment of the Supreme Court of New Jersey. The judgment of the Supreme Court of New Jersey had affirmed a judgment of the Superior Court of New Jersey, Law Division, filed

December 2, 1957, which, in an action to condemn appellant's property situated in Round Valley, State of New Jersey, adjudged that the appellee was entitled to the relief demanded in the complaint herein and appointed commissioners of appraisal.

The Decision of This Court

On or about January 26th, 1959, this Court handed down the following decision upon the appellee's motion to dismiss the appeal or to affirm the judgment appealed from, namely:

> "The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question."

Statement of Facts Relating to This Application for Rehearing

In appellant's Statement as to Jurisdiction, at pages 8-9 thereof, he showed to this Court that, after the commissioners of appraisal had been appointed pursuant to the judgment herein appealed from, a wholly inadequate condemnation award was made to appellant who thereupon took steps to review that award. A trial on that issue was begun before the Superior Court of New Jersey while the appellant's appeal to this Court was still pending. Meanwhile, the appellee paid into Court the sum awarded by the commissioners of appraisal but has not yet taken possession of the property in question.

The trial before the Superior Court is still in progress: More than a month of actual days in court have already been consumed and the appellee has not yet finished putting in its defense to the affirmative case made out by the appellant herein. A considerable amount of additional days in court will be necessary to finish the trial before the Superior Court.

At the start of this trial before the Superior Court, appellant raised again, on the record, all the questions presented to this Court by his notice of appeal herein. Thus, at the opening of the hearing in the Superior Court, the appellant, by appropriate motions to dismiss the action herein, raised the following federal questions; namely:

Whether the Round Valley Act is repugnant to the due process and equal protection clauses of the 14th Amendment?

Whether the New Jersey Legislature, in enacting the Round Valley Act, created a "debt" or "liability" of the State in contravention of the due process and equal protection clauses of the 14th Amendment?

Whether the Round Valley Act involves an unconstitutional delegation of legislative powers to the Commissioner of Conservation and Economic Development and is therefore repugnant to the due process and equal protection clauses of the 14th Amendment?

Whether the Round Valley Act is repugnant to the due process and equal protection clauses of the 14th Amendment in that it fails to provide appellant and other interested parties due notice and an opportunity to be heard?

Whether the judgment of the Supreme Court of New Jersey, herein appealed from, is in contravention of the due process and equal protection clauses of the 14th Amendment?

Whether the aforesaid judgment of the Supreme Court of New Jersey is in contravention of the said clauses of the 14th Amendment on the ground that the Round Valley Act has expired according to its terms?

Whether the courts below had erred, in contravention of the due process and equal protection clauses of the 14th Amendment, in precluding the appellant from

demonstrating that the Commissioner had delegated to others powers attempted to be conferred to him by the Round Valley Act?

Whether the New Jersey Legislature appropriated funds in violation of the due process and equal protection clauses of the 14th Amendment since it does not appear that the Governor of New Jersey had certified that there were sufficient funds on hand or anticipated for this improvement?

Whether the employment by the appellee of Special Counsel was repugnant to the due process and equal protection clauses of the 14th Amendment?

Whether Joseph E. McLean, the past incumbent of the office of Commissioner of Conservation and Economic Development, is the official authorized to conduct the present proceeding?

The trial judge overruled all the foregoing contentions except the last one; as to that, he granted the appellee leave to substitute the present incumbent of the office of Commissioner.

All of the foregoing issues are the very same issues presented by this appeal and have been reserved by appellant upon the hearing before the Superior Court of New Jersey.

The Basis of This Application for a Rehearing

An application for a rehearing will be entertained where there are intervening circumstances of substantial or controlling effect.

> *Sanitary Refrigerator Co.* v. *Winters,* 280 U. S. 30, 34, footnote 1;
> *Massey* v. *United States,* 291 U. S. 608.

Secondly, substantial grounds, not previously presented, justify an appeal as of right to this Court.

See:

Schriber-Schroth Co. v. *Cleveland Trust Co.*, 305 U. S. 47, 50.

POINT I

The motion for rehearing should be granted and the appeal held until the determination of the proceedings before the Superior Court of New Jersey.

As above pointed out, all the questions presented by this appeal have been raised again on the record at the trial before the Superior Court of New Jersey. That trial, which has already consumed more than a month of actual days on trial, is still in progress, the trial having started after the appellant had taken his appeal as of right to this Court. It would be in the interests of justice if this Court should hold the appeal as of right herein pending the determination of the proceedings in the New Jersey Superior Court, since appellant has reserved the right to review these questions upon another appeal to this Court from the final judgment fixing the condemnation award herein.

It is respectfully submitted that the aforesaid matters have developed since the appeal as of right was originally taken and constitute intervening circumstances of substantial and controlling effect within the meaning of the rules of this Court.

POINT II

A substantial ground of appeal is available to appellant, although not previously presented.

In his statement as to jurisdiction, appellant did not adequately present a ground available to him, namely, that the taking herein complained of was not for a public use. The undisputed fact is that the Commissioner has acquired much more land than can be used for reservoir purposes under an outstanding decree of the United States Supreme Court. In this connection, the trial court judge pointed out that, under the aforesaid decree, New Jersey may take only 100 million gallons of Delaware River water per day for out-of-basin uses and that existing commitments reduce the amount available for any reservoir system at Round Valley to a figure which would permit only a much smaller reservoir. (See opinion at pp. 42-43 of Jurisdiction Statement.) Consequently a substantial question is presented herein as to whether appellant's lands have been taken for a public use.

See:

Bragg v. *Weaver*, 251 U. S. 577.

CONCLUSION

The motion for a rehearing should be granted and, upon rehearing appellee's motion to dismiss should be denied.

Respectfully submitted,

.....

VITO F. LANZA,
Attorney and Counsel for
Appellant Silvio A. Lanza.

THOMAS GRIMES, Esq.,
on the Brief.

Certificate of Counsel

This is to certify that the foregoing petition for rehearing on the grounds therein mentioned, is presented in good faith and not for delay.

Dated, February 10, 1959.

.....

VITO F. LANZA,
Counsel for Appellant.